

**NOAA and EPA Response to Comments Regarding the Agencies’ Proposed Finding that Oregon has
Failed to Submit a Fully Approvable Coastal Nonpoint Program**

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I. BACKGROUND

On December 20, 2013, the National Oceanic and Atmospheric Administration (NOAA) and the Environmental Protection Agency (EPA) announced a 90-day public comment period in the Federal Register, with regard to the agencies' intent to find that Oregon has failed to submit an approvable coastal nonpoint pollution control program (coastal nonpoint program) pursuant to Section 6217 of the Coastal Zone Act Reauthorization Amendments. The proposed findings document explained the federal agencies' rationale for this proposed decision.¹

Section 6217(a) of the Coastal Zone Act Reauthorization Amendments (CZARA), 16 U.S.C. section 1455b(a), requires that each state (or territory) with a coastal zone management program previously approved under section 306 of the Coastal Zone Management Act must prepare and submit to the federal agencies a coastal nonpoint pollution control program for approval by NOAA and EPA. For states with coastal zone management programs that were approved by NOAA prior to 1991, coastal nonpoint programs were to be submitted for approval by July 1995. Oregon submitted its coastal nonpoint program to the federal agencies for approval at that time. The federal agencies provided public notice of and invited public comment on their proposal to approve, with conditions, Oregon's coastal nonpoint program (62 FR 6216). The federal agencies approved the program by letter dated January 13, 1998, subject to the conditions specified in the letter (63 FR 11655).

Over time, Oregon made incremental changes to its program in order to satisfy the identified conditions. However, in the December 20, 2013 proposed findings document, NOAA and EPA determined that Oregon has not addressed all conditions placed on its program. Therefore the federal agencies proposed to find that the state has not submitted a fully approvable coastal nonpoint program.

NOAA and EPA's proposed findings focused on three conditions placed on Oregon's program—new development, onsite sewage disposal systems (OSDS), and additional management measures for forestry. In addition to seeking public comment on these proposed findings, the federal agencies also sought public comment on the adequacy of the State's programs and policies for meeting the 6217(g) agriculture management measures and conditions. The specific agriculture questions NOAA and EPA asked the public to respond to were: (1) Has the State satisfied the agriculture conditions placed on its coastal nonpoint program?; and (2) Does the State have programs and policies in place that provide for the implementation of the 6217(g) agriculture management measures to achieve and maintain water quality standards and protect designated uses?

NOAA and EPA received 85 comments during the 90-day public comment period.² Nearly all comments were unique; only three comments were identical. Many comments supported NOAA and EPA's proposed finding while others opposed the proposed finding. Of the comments that opposed the proposed finding, some did so because they believe Oregon has either fully met its CZARA obligations or just needs more time. The remaining comments opposed the finding on the grounds that NOAA and EPA should not withhold federal funding, which would be the statutory consequence of finding that the state has failed to submit a fully approvable coastal nonpoint program. These comments largely took the position that the State needs to do more to protect water quality. Several comments did not offer

¹ See <http://coastalmanagement.noaa.gov/nonpoint/oregonDocket/OR%20CZARA%20Decision%20Doc%2012-20-13.pdf> for NOAA and EPA's proposed finding on Oregon's Coastal Nonpoint Program.

² See <http://coastalmanagement.noaa.gov/nonpoint/oregonDocket/publicComments.html> to view all comments received and who provided comments.

specific views on the proposed finding, but instead commented on specific aspects of coastal nonpoint source pollution management in Oregon. Most of those comments implied that the State needs to do more to protect coastal water quality.

After considering comments received, including comments and an updated coastal nonpoint program submittal from the state, NOAA and EPA find that Oregon has failed to submit an approvable coastal nonpoint program under Section 6217 of the Coastal Zone Act Reauthorization Amendments.³

This document provides a summary of the public comments received and NOAA and EPA's response to those comments.

II. GENERAL COMMENTS

A. Proposed Finding

Comment: Many comment letters supported NOAA and EPA's proposed finding that Oregon has failed to submit a fully approvable coastal nonpoint program under Section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA). One theme within the general comments is that although Oregon has been under administering an approved program subject to conditions for 16 years, Oregon still does not have a fully approvable program in place to control polluted runoff to coastal waters and protect designated uses. Another general theme is that the State has not adopted additional management measures for forestry where water quality impairments and degradation of beneficial uses attributable to forestry exist despite implementation of the CZARA management measures developed under Section 6217(g). A number of comment letters also noted that the State failed to follow through on its 2010 commitments to NOAA and EPA to address three remaining conditions on its program related to new development, septic systems, and forestry by March 2013. .⁴

While some commenters agreed that Oregon needs to do more to improve water quality, they did not agree with NOAA and EPA's proposed finding because they opposed withholding federal funding under CZMA Section 306 and CWA Section 319 (see Funding Section below for more discussion on this issue).

A few commenters noted NOAA and EPA should continue to work with Oregon to improve its water quality programs and that the State just needs additional time to meet the CZARA requirements.

Other commenters opposed NOAA and EPA's proposed finding. They stated Oregon does have adequate programs in place to meet or exceed the CZARA requirements. More specific comments are discussed in sections below.

Source: 1-C, 2-B, 4-A, 5-A, 8-B, 9-A, 13-A, 14-A, 14-C, 15-A, 16-B, 17-A, 19-B, 22-A, 22-C, 23-A, 24-A, 25-A, 25-B, 26-B, 28-A, 30-A, 30-B, 30-H, 31-A, 33-A, 33-B, 34-A, 35-A, 36-A, 36-B, 36-C, 37-B, 37-C, 37-D, 40-A, 41-A, 42-A, 42-B, 43-A, 44-A, 44-B, 46-A, 47-A, 48-B, 49-A, 53-A, 52-A, 54-A, 55-B, 56-C, 57-A, 64-B, 64-D, 66-B, 66-D, 68-B, 68-D

Response: NOAA and EPA appreciate the many comments received in response to the federal agencies proposed finding to find that Oregon has failed to submit an approvable program under Section 6217 of

³ See [date] final decision document on Oregon's Coastal Nonpoint Program at ***.

⁴ The State made its commitments in a July 21, 2010, letter from Neil Mullane, Department of Environmental Quality, and Robert Bailey, Department of Land Conservation and Development, to Mike Bussell, Environmental Protection Agency Regional 10, and John King, National Oceanic and Atmospheric Administration.

the Coastal Zone Act Reauthorization Amendments (CZARA). After carefully considering all comments received and the State's March 20, 2014, response to the proposed finding, NOAA and EPA find that Oregon has failed to submit an approvable program. Although Oregon has made tremendous progress in addressing many of the original conditions associated with approval of the State's program, the State has not revised and implemented to additional management measures for forestry and forest lands that are necessary to achieve and maintain water quality standards and to protect designated uses. The basis for this finding is explained more fully in the determination document. After consideration of public comments received, NOAA and EPA find that the State has failed to submit a fully approvable program under Section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA). The two federal agencies will begin withholding federal grant assistance funds are directed under CZARA.

Although some comments urged NOAA and EPA to provide Oregon with additional time to develop and implement additional management measures (as necessary to achieve and maintain water quality standards and to protect designated uses) and not to withhold funding to the State, the CZARA statute does not afford the federal agencies with that flexibility. State Legislature Has Been Obstructing ODEQ's Ability to Make Changes

Comment: One comment letter stated that the Oregon Department of Environmental Quality (DEQ) has been working hard to get the improvements needed to improve water quality and meet all coastal nonpoint program requirements. However the State Legislature has been obstructing DEQ's progress and is the one that needs to take action.

Source: 25-C

Response: The federal agencies do not attempt to address or consider the role of the State legislature in making the in the course of the federal agencies' findings on Oregon's program. NOAA and EPA have been working closely with DEQ, the Department of Land Conservation and Development (DLCD), and other agencies to complete the development of the state's coastal nonpoint program. We commend the agencies for the progress they have made to strengthen Oregon's coastal nonpoint program and address many of the remaining conditions. Ultimately, CZARA refers to actions by a "State" collectively and does not distinguish between or among various branches within or departments of state governments.

B. Federal and State Governments Have Responsibility to Manage Waters

Comment: One comment letter stated that the federal and state governments have a responsibility to manage waters in the public trust for maximum long-term benefit for current and future generations. They noted this was not being done. The comment did not provide any additional information explaining the basis for this position.

Source: 22-C

Response: Federal and State governments do have a responsibility to manage public waters for current and future generations. Congress created CZARA as a tool for NOAA and EPA, along with our State partners, to use to help protect coastal waters. NOAA and EPA strive to carry out these responsibilities within the constructs of federal statute and associated guidance.

III. FUNDING

A. Impacts of Withholding Funds

Comment: Some comment letters highlighted that withholding funds under Section 306 of the Coastal Zone Management Act (CZMA) and Section 319 of the Clean Water Act (CWA) could negatively impact Oregon's ability to improve water quality and support beneficial programs such as Total Maximum Daily Loads (TMDLs), Oregon Watershed Enhancement Board (OWEB) watershed planning and restoration projects, local land use planning, as well as the State's ability to provide technical assistance to coastal communities to address pressing coastal management issues such as coastal hazards, stormwater management, and growth management. A few comment letters argued against NOAA and EPA withholding funds from these programs because they felt withholding funding from two important programs for addressing polluted runoff and coastal habitat issues in the State is counterproductive to accomplishing the goals of these programs and unlikely to result in the policy and programmatic changes NOAA and EPA are seeking. Others noted that withholding funding would hurt two State programs and agencies, Oregon's Coastal Management Program in the Department of Land and Conservation and Development and Oregon's Nonpoint Source Management Program in the Department of Environmental Quality, that have very little (if any) influence over some of the most significant remaining issues (i.e., forestry and agriculture). Some commenters also noted that withholding funds would negatively impact coastal communities and watershed groups that also rely on this funding from NOAA and EPA.

Other commenters supported withholding funds even though they acknowledged it may have some negative impacts initially. They saw withholding funding as the only way to get further action in the State to improve water quality and protect designated uses. One comment letter also noted that NOAA and EPA's failure to withhold funding sooner allowed Oregon to "limp along for over 16 years with inadequate management measures for its coastal nonpoint program while drinking water and other water quality impairments occurred."

Source: 1-C, 5-A, 8-B, 14-C, 16-B, 17-A, 25-A, 25-B, 25-D, 25-E, 25-F, 33-A, 33-B, 36-A, 36-B, 36-C, 37-B, 37-C, 37-D, 43-A, 48-B, 55-B, 64-B, 66-B, 68-B,

Response: The statute directs NOAA and EPA to withhold funding when the agencies find that a State has failed to submit an approvable coastal nonpoint program (as is the case with Oregon). NOAA and EPA recognize that withholding funding under Section 306 of the CZMA and Section 319 of the CWA could make it more difficult for Oregon to maintain the same level of effort on key programs that help improve water quality and protect salmon habitat, such as the State's coastal management, TMDL, and nonpoint source programs. However, the penalty provision in CZARA appears to have been designed to encourage states to develop fully approvable coastal nonpoint programs in a timely manner to provide better protection for coastal water quality. NOAA and EPA will continue to work with Oregon to complete the development of its coastal nonpoint program so that the funding reductions from the penalties can be eliminated as soon as possible.

B. Oregon Stands to Lose \$4 million per Year in Federal Funding

Comment: Several comment letters stated that if NOAA and EPA find that Oregon has failed to submit a fully approvable coastal nonpoint program stands, Oregon would lose \$4 million a year in federal funding.

Source: 1-C, 14-C, 43-A

Response: The comment appears to over-estimate the amount of federal grant funds subject to withholding. For each calendar year, beginning with federal FY 2015, CZARA directs the withholding of 30 percent of a state's allocations under Section 306 of the CZMA and Section 319 of the Clean Water Act. For FY 2015, Oregon's total allocation under these two programs is approximately \$*** in federal funding, representing a total of \$*** for \$** for CZMA Section 306 and \$** for CWA Section 319 purposes.

III. AUTHORITIES UNDER THE COASTAL ZONE ACT REAUTHORIZATION AMENDMENTS (CZARA)

A. Suitability of Voluntary Approaches Backed By Enforceable Authorities

Comment: Several comment letters noted that CZARA requires coastal states to have enforceable mechanisms for each management measure. These letters registered dissatisfaction with the voluntary approaches Oregon is using to address many CZARA management measure requirements. These letters noted that Oregon's voluntary approaches are not being adhered to and that Oregon is not using its back-up authority to enforce and ensure implementation of the CZARA management measures, when needed. A few comment letters also noted that Oregon has not described the link between the enforcement agency and implementing agency and the process the agencies will use to take enforcement action when voluntary approaches are not adequate to protect water quality. Another commenter stated comment letter that voluntary approaches will not work and that the state needs to adopt approaches that could be enforced directly.

Source: 15-C, 15-D, 16-A, 28-E, 30-O, 46-H, 49-J

Response: States must have enforceable policies and mechanisms to implement the CZARA management measures (see Section 306(d)(16) of the Coastal Zone Management Act). As the NOAA and EPA January 1993 *Coastal Nonpoint Pollution Control Program Development and Approval Guidance* states, the federal agencies have interpreted the statutory provisions to mean that "these enforceable policies and mechanisms may be state or local regulatory controls, and/or non-regulatory incentive programs combined with state enforcement authority." Therefore, voluntary, incentive-based programs are acceptable approaches for meeting the CZARA management measure requirements as long as a state can demonstrate it has adequate back-up authority to ensure implementation of the CZARA management measures, when necessary.

For coastal nonpoint program approval, CZARA requires NOAA and EPA to assess whether or not a coastal state with an approved CZM program "provides for the implementation" of 6217(g) management measures (Section 6217(b)). To do this, NOAA and EPA examine whether the state has processes in place that are backed by enforceable policies and mechanisms to implement the 6217(g) management measures. In approving a state's coastal nonpoint program, NOAA and EPA have not retroactively evaluated how well those processes, including voluntary ones, have worked or been enforced; rather, the federal agencies have accepted such measures when the state provides the following:

1. a legal opinion from the attorney general or an attorney representing the agency with jurisdiction for enforcement that such authorities can be used to prevent nonpoint pollution and require management measure implementation, as necessary;
2. a description of the voluntary or incentive-based programs, including the methods for tracking and evaluating those programs, the states will use to encourage implementation of the management measures; and
3. a description of the mechanism or process that links the implementing agency with the enforcement agency and a commitment to use the existing enforcement authorities where necessary.

(See *Final Administrative Changes to the Coastal Nonpoint Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 and Enforceable Policies and Mechanisms for State Coastal Nonpoint Programs*.)⁵ The latter two provisions in the third item ensure that such programs, even though implemented through voluntary measures, are, at their core, “enforceable policies and mechanisms” as provided in the statute.

Program implementation occur after coastal nonpoint program approval, and the opportunity for evaluation of the effectiveness of that implementation is available under other statutory mechanisms. Section 6217(c)(2) of CZARA directs participating states to implement their approved programs through changes to their nonpoint source management plan, approved under Section 319 of the Clean Water Act, and through changes to its coastal zone management program, developed under Section 306 of the Coastal Zone Management Act. Therefore, NOAA and EPA have some opportunity to evaluate a state’s implementation of its coastal nonpoint program through routine assessment mechanisms of such a state’s Nonpoint Source Management Program and Coastal Management Program.

Regardless, for the new development and onsite sewage disposal system management measures, the federal agencies do believe the State of Oregon has sufficiently demonstrated the link between implementing and enforcing agencies, as well as a commitment to use that authority. With regard to management measures for forestry, NOAA and EPA agree with the assertion that the State has not met all the criteria enabling it to rely on voluntary programs backed by enforceable authorities, to demonstrate its “enforceable policies and mechanisms.” The final findings document on Oregon’s Coastal Nonpoint Program explains the bases for NOAA and EPA findings on the State’s proffered reliance on voluntary measures to address additional management measures for forestry and forested lands that are necessary to meet water quality standards and to protect designated uses.

B. Federal Government Taking Over Oregon’s Coastal Nonpoint Program

Comment: One comment letter noted that NOAA and EPA have an obligation to step in for Oregon and take over its coastal nonpoint pollution control program since the state lacks the will to address its polluted runoff issues.

Source: 55-C

Response: Unlike some of the EPA water quality programs under the Clean Water Act, such as the National Pollutant Discharge Elimination System (NPDES) Program, CZARA provides for exclusive state

⁵ Both guidance documents are available at <http://coast.noaa.gov/czm/pollutioncontrol/>.

and local decision-making regarding the specific land-use practices that will be used to meet the coastal nonpoint program management measures. The Coastal Zone Management Act program itself is voluntary for states in that a state may decline the federal grants available to states administering coastal zone management programs under that statute. Neither the Coastal Zone Management Act nor the Clean Water Act, much less the CZARA amendments, provide NOAA or EPA with the authority to administer a coastal nonpoint pollution control program if the state declines to do so.

C. Oregon Needs More Time to Develop Its Coastal Nonpoint Program

Comment: A few comment letters stated that NOAA and EPA should give Oregon additional time to develop a fully approvable coastal nonpoint program. They noted that developing a program and addressing the remaining conditions NOAA and EPA placed on the State's program is very challenging and that the State has made significant progress in meeting the identified conditions since the earlier approval subject to conditions. They also noted that the State is continuing to make additional improvements, such as the current rulemaking process by the Oregon Board of Forestry to achieve better riparian protection for fish-bearing streams, and that the State needs more time before the new rule is adopted.

A few other comment letters noted that Oregon has had plenty of time to address deficiencies since receiving conditional approval for its coastal nonpoint program in 1998, and those comments assert that water quality is no better now than it was 16 years ago.

Source: 14-D, 33-C, 28-F

Response: NOAA and EPA have already provided Oregon sufficient time to develop a fully approvable coastal nonpoint program. The federal agencies agree that the State has met many of the conditions associated with the earlier approval, and that the federal agencies would otherwise be prepared to invite public comment on their tentative approval of those conditions. NOAA and EPA proposed to find that the State failed to submit an approvable program based on commitments made by the State to the federal agencies in 2010. Since that time, not only has the State not made progress on its 2010 commitments, it has not offered any alternatives to its earlier commitments. As applicable to forestry and forested lands, development and implementation of additional management measures remain necessary to achieve and maintain water quality standards and to protect designated uses. CZARA Requires State to Address Issues Outside of Its Control

Comment: One comment letter disagreed that "states" have to meet all CZARA management measures. They noted that some measures, such as onsite sewage disposal systems (OSDS), are often addressed at the local level, and are therefore, outside of the state's jurisdiction.

Source: 10-B

Response: The CZARA amendments requires all coastal states participating in the National Coastal Zone Management Program to develop coastal nonpoint programs that "provide for the implementation, at a minimum, of management measures in conformity with the guidance published under subsection (g), to protect coastal waters..." (See Section 6217 (b), 16 U.S.C. 1455b(b)). The 1993 guidance EPA developed to comply with subsection (g), *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*, outlines two management measures related to new and existing OSDS that states must address.

With regard to the two OSDS management measures, all coastal states have exercised state-wide authority to regulate many aspects of OSDS, such as siting requirements and qualifications needed to inspect OSDS. NOAA and EPA acknowledge that many states have been reluctant to require inspections of OSDS at the state level, but that reluctance should not be confused with an inherent limitation of state powers. From a practical standpoint, NOAA and EPA recognize that local governments often play a significant role in managing OSDS, and the federal agencies have therefore accepted a variety of approaches from coastal states for meeting the OSDS management measures, as well as other measures, including those that have relied on a mixture of state and local-level authorities, local efforts with sufficient geographic coverage, or state-led voluntary approaches backed by enforceable authorities.

D. NOAA and EPA Holding Oregon to a Higher Standard

Comment: One comment letter stated that NOAA and EPA are holding Oregon to a higher standard than other states. The comment asserts that the higher approval threshold for Oregon (compared to other states) is unfair to Oregon and . That comment letter suggested that NOAA and EPA focus on helping Oregon meet the previously established minimum standards for other state coastal nonpoint programs rather than require Oregon to meet a higher bar.

Source: 10-A

Response: NOAA and EPA have not been provided evidence that Oregon is being held to a higher standard than other states. The agencies have this The CZARA statutory requirements and guidance that the federal agencies use to evaluate Oregon's program are the same as those that have been applied to evaluate the approvability of every other 'state's state's program. NOAA and EPA required California, Oregon and Washington to develop additional management measures for forestry that went beyond the basic CZARA 6217(g) forestry management measures. , them The additional management measures were identified as conditions on approval based on the need to achieve and maintain protective water quality standards for the protection of designated uses for salmonids; and the significance of timber harvesting effects on water quality across these states. Oregon, Washington, and California continued to experience adverse impacts to salmon and salmon habitat due to forestry activities despite having programs in place to satisfy the standard suite of 6217(g) forestry management measures. As a result, additional management measures for forestry were needed.

E. Need to Take a Tailored Approach to NPS Control

Comment: A few comment letters asserted that NOAA and EPA are applying a "one-size-fits all" approach to addressing nonpoint source pollution in Oregon by requiring the State to meet specific national management measures. They felt that a more tailored approach that considers Oregon's specific circumstances would be more appropriate.

Source: 8-C, 10-E

Response: By its nature, CZARA affords states significant flexibility to develop programs that are consistent with the broad national 6217(g) management measure requirements, yet are tailored to meet a state's specific circumstances. Section 6217 does not provide NOAA or EPA with authority to require states or local governments to take specific actions to address coastal nonpoint source pollution, and in specifying conditions on approval that additional management measures were necessary to meet

water quality standards and uses, NOAA and EPA did not do so. Rather, NOAA and EPA assist each participating coastal state to find the best approach for each state that is consistent with the overarching CZARA requirements.

As required by section 6217 (g), in 1993 EPA published *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*. The guidance specifies 56 management measures that form the core requirements of a state's coastal nonpoint program. While the guidance establishes baseline standards for addressing broad categories and sources of nonpoint source pollutants, there are many different approaches that states can take to be consistent with the 6217(g) management measure requirements. For each management measure, the guidance provides examples of a variety of different things states can do to satisfy the requirements of the management measure. To date, NOAA and EPA have approved – without conditions -- 22 state coastal nonpoint pollution control programs developed under CZARA. The publicly available approval documents, on NOAA's coastal nonpoint program website, demonstrate a variety of state-specific approaches.

While NOAA and EPA have provided Oregon with various recommended suggestions for addressing various management measures and controlling coastal nonpoint pollution, decisions about which to develop, adopt, and implement specific approaches to address the management measures rest with the State.

G. Coastal Nonpoint Program Needs to Address Climate Change

Comment: One comment letter noted that Oregon's Coastal Nonpoint Program needs to address climate change, water shortages, and toxins, as these will become even more pressing issues as the climate continues to change.

Source: 50-A

Response: Climate change is an important issue facing coastal states and may contribute to adverse impacts to coastal water quality. NOAA and EPA take climate change very seriously and are involved in a number of initiatives to help states and other entities improve the resiliency of coastal communities in response to the impacts of climate change. For example, through the National Coastal Zone Management Program, NOAA has been providing financial and technical assistance to Oregon to encourage local governments to incorporate climate change considerations and hazards into their local comprehensive plans. Specifically, NOAA and Oregon have been working with local governments to plan for and reduce exposure to climate-related natural hazards in Oregon's coastal zone.

Neither the CZARA amendments nor the 1993 guidance under section 6217(g) specifically identified management measures applicable to management of climate change effects through state coastal nonpoint programs. When approving state coastal nonpoint programs, NOAA and EPA ensure that state programs provide for implementation of management measures in conformity with the 1993 *Guidance Specifying Management Measures for Sources of Nonpoint Source Pollution in Coastal Waters*, developed pursuant to Section 6217(g). Section 6217(b)(3) provides for additional management measures that are necessary to achieve and maintain water quality standards under the Clean Water Act and to protect designated uses. The 1993 guidance mentions climate change in the discussion of several suggested best management practices that a state could employ to implement a particular management measure. The discussion for the new onsite sewage disposal system management measure, for example, notes that the rate of sea level rise should be considered when siting onsite sewage disposal systems

and the discussion for the stream bank and shoreline erosion management measure notes that setback regulations should recognize that special features of the stream bank or shoreline, may change, providing an example of beaches and wetlands that are expected to migrate landward due to rising water levels as a result of global warming. The illustrative examples, however, are not required elements for a state's coastal nonpoint program. Implementation of some measures nonetheless results in reduced stressors on coastal water quality, and reduced pollutant loads, which ultimately should help improve coastal resiliency in the face of adverse effects of climate change.

H. Proposed Finding Exceeds NOAA and EPA's Authority

Comment: One comment letter stated that the federal government places too many regulations on the states, private property owners, and individuals and that NOAA and EPA exceeded the limits defined by the U.S. Constitution. The comment letter suggested that Congress should remove the budgets for NOAA and EPA and return those funds back to the state.

Source: 29-A

Response: Congress created the Coastal Nonpoint Program under Section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA) of 1990. In doing so, Congress charged NOAA and EPA to administer the program. In finding that Oregon has failed to submit an approvable coastal program, NOAA and EPA are carrying out their administrative responsibilities under CZARA.

I. The Public Comment Period Is Not Needed

Comment: One comment letter questioned why NOAA and EPA requested public comment on their proposed finding. They noted public comment should not be needed so long as the federal agencies' finding and analysis is based on established criteria and valid science (and they believed this to be the case).

Source: 15-B

Response: Public participation has served as an essential part of the federal agencies' decision making processes for administration of their responsibilities related to the Coastal Nonpoint Program. Consistent with the public participation policies in the Coastal Zone Management Act and the Clean Water Act, NOAA and EPA have historically considered public input when making findings about a state's coastal nonpoint program.

IV. GENERAL—WATER QUALITY, MONITORING, AND ENFORCEMENT

A. Status of Oregon Coastal Water Quality Should Inform NOAA and EPA Decision

Comment: Many comment letters expressed the need for Oregon to do more to improve coastal water quality and protect designated uses. They believe the fact that many coastal water quality problems in the State still exist demonstrate that Oregon's existing programs to control coastal nonpoint source pollution are inadequate and that the State needs to do more to strengthen its coastal nonpoint pollution control program. Specific concerns cited include failure to meet water quality standards, specifically for temperature, sediment, and/or toxics; impaired drinking water; and recent federal species listings under the Endangered Species Act for salmon, salmon habitat, amphibians, and wildlife. For example, several letters cited the recent federal listing of Southern Oregon-Northern California

Coast coho salmon as illustrative of how salmon populations and habitat have continued to decline, due, in part, to human-related water quality and habitat impairments. Comments assert that timber harvesting, agriculture, and urban development contribute to these impairments. Comments also assert that Oregon fails to identify land uses causing water quality impairments or threatening water quality because the State ignores technical information available about land uses that consistently cause or contribute to violations of water quality standards in coastal watersheds.

Several other comments noted that recent improvements in Oregon's coastal water quality and salmon runs demonstrate that the State's coastal nonpoint pollution control program is effective. One letter stated that Oregon streams are among the cleanest in the country and provide good water for aquaculture. A few other letters noted the good work and water quality and habitat improvements being accomplished by watershed groups, the Oregon Watershed Enhancement Board (OWEB), and Soil and Water Conservation Districts (SWCDs). They also noted the voluntary efforts undertaken by the timber industry and farmers (cattlemen). For example, one letter described how federal, state, county and private citizen groups have effectively worked together to improve the Tillamook watershed. They cited an Oregon Department of Fish and Wildlife study indicating that out-migrating and returning salmon to Tillamook State forest land demonstrate the results of this restoration work.. Another letter stated there was too much focus on the need to see water quality improvements, and that given the increase in human population and other development pressures in recent decades, even maintaining water quality levels should be considered a success.

Source: 1-A, 1-B, 5-B, 8-A, 10-C, 11-A, 14-B, 15-E, 19-B, 19-E, 20-A, 20-D, 22-D, 25-A, 26-A, 28-F, 30-B, 30-I, 30-O, 31-B, 35-A, 35-B, 35-C, 39-A, 42-B, 42-C, 42-I, 43-F, 44-B, 48-C, 56-B, 57-GG, 57-NN, 57-VV, 82-C, 82-E, 83-C, 83-D

Response: NOAA and EPA recognize that voluntary programs, such as those implemented by OWEB and SWCDs, play an important role in nonpoint source management and water quality improvements in coastal Oregon. Oregon has experienced some noteworthy successes, such as returning salmon populations to the Tillamook watershed. However, the State's most recent Clean Water Act section 303(d) list of waters not meeting water quality standards reflects, Oregon still grapples with impaired waterbodies that continue to not achieve water quality standards or support designated uses, such as domestic water supply (drinking water) and fish and aquatic life (e.g., salmon). As stated in the CZARA amendments, the purpose of a state coastal nonpoint program should be to "develop and implement management measures for nonpoint source pollution to restore and protect coastal waters," and therefore monitoring is an essential activity for determining the success of a state program.

CZARA does not require states to have clean water throughout their coastal nonpoint program management areas before receiving full approval from NOAA and EPA for their coastal nonpoint programs. Rather, CZARA employs an adaptive management approach. States, such as Oregon, must have processes in place to implement the 6217(g) management measures as well as to identify and implement additional management measures when needed to achieve water quality standards and to protect designated uses (see Section 6217(b)).

The legislative history (floor statement of Rep. Gerry Studds, House sponsor of section 6217)) indicates that implementation of the section 6217(g) management measures is "intentionally divorced from identified water quality problems because of the enormous difficulty of establishing cause and effect linkages between particular land use activities and specific water quality problems." Therefore, as noted above, when deciding whether or not to fully approve a state's coastal nonpoint program, NOAA and EPA assess whether or not a state has appropriate technically achievable and financially-based

management measures in place. The agencies do not attempt to make cause-and-effect associations between specific approaches and the achievement of water quality standards, nor attempt to tie specific management measures or their absence to the current status of the state's water quality.

B. Need Improved Water Quality Monitoring

Note: See also specific comments related to Agriculture-Monitoring and Tracking, Pesticides-Monitoring and Tracking, and Forestry-Pesticides.

Comment: Several comments expressed concern about the adequacy of Oregon's water quality monitoring programs, especially with regard to monitoring after aerial application of pesticides and herbicides on forest lands. Comments stated that Oregon does not have monitoring programs in place to adequately assess whether pollution controls are achieving their goals and protecting water quality. Therefore, it is difficult for the State to determine if and when additional management measures are needed, as CZARA requires.

Commenters suggested several different monitoring approaches that Oregon could implement to adequately protect water quality. These included: requiring turbidity monitoring of streams during and after rainstorms and taking enforcement action when excess turbidity is found; requiring recurrent road surface condition monitoring; requiring more frequent inspections of drinking water, especially when pesticide spraying occurs; and improving upon a recently developed strategy for determining agricultural landowners' compliance with water quality rules.

Several other letters stated that Oregon's monitoring and tracking programs were adequate and commended the state's greater focus on water quality monitoring over the past few years.

Source: 2-A, 30-R, 42-G, 42-H, 46-H, 49-I, 57-BB, 71-??, 84-??.

Response: NOAA and EPA appreciate commenters' concerns about the adequacy of Oregon's water quality monitoring programs. The federal agencies agree that for some issues, e.g., pesticide effects in Type N streams, monitoring data may be insufficient. Thei, water quality improvements

However, NOAA and EPA did not propose a finding on the approvability of the overall monitoring and tracking elements of Oregon's Coastal Nonpoint Program and did not solicit comment on this issue at this time. The public will have an opportunity to comment on this aspect of Oregon's program at some point in the future before the agencies fully approve Oregon's coastal nonpoint program. (See also the appropriate Forestry and Agriculture sections in this document for responses to specific comments about the monitoring and tracking efforts related to Oregon's forestry and agriculture programs.)

C. Enforcement

Comment: One commenter noted that Oregon fails to systematically address water quality standard violations caused by excess sedimentation.

Source: 57-UU

Response: CZARA requires state coastal nonpoint programs to "provide for the implementation" of the 6217(g) management measures (Section 6217(b)). NOAA and EPA have identified sediment impacts from forestry activities that have not been addressed through the standard suite of management

measures and have required Oregon to address sediment impacts through additional management measures for forestry and on forested lands.

Implementation of Oregon's coastal nonpoint program and evaluation of the effectiveness of that program will occur after federal program approval. Section 6217(c)(2) of CZARA provides for states to implement their approved programs through changes to their nonpoint source management plan, approved under Section 319 of the Clean Water Act, and through changes to its coastal zone management program, developed under Section 306 of the Coastal Zone Management Act. Therefore, NOAA and EPA evaluate how well a state is implementing its coastal nonpoint program through routine assessment mechanisms for the state's Nonpoint Source Management Program and Coastal Management Program.

Finally, as stated in the introductory chapter of the 6217(g) guidance, *Guidance Specifying Management Measures for Sources of Nonpoint Source Pollution in Coastal Waters*, the legislative history (floor statement of Rep. Gerry Studds, House sponsor of section 6217) acknowledges that the management measures are based on technical and economic achievability rather than achieving particular water quality standards.⁶ The legislative history indicates that implementation of management measures was "intentionally divorced from identified water quality problems because of the enormous difficulty of establishing cause and effect linkages between particular land use activities and specific water quality problems." Therefore, as noted above, in reviewing state programs under the Coastal Nonpoint Program for conformity with the 1993 Section 6217(g) guidance, NOAA and EPA assessed whether or not a state had appropriate technically and economically achievable management measures in place, not whether the approaches effectively achieved and maintained water quality standards.

If, after implementing the technology-based 6217(g) management measures, water quality impairments are still occurring, then CZARA employs an adaptive management approach. The Act requires states to provide for the implementation of additional management measures within identified areas to address land uses that are either currently causing water quality impairments or where reasonably foreseeable new or expanding land uses could threaten coastal water quality (Section 6217 (b)(3)).

V. CRITICAL COASTAL AREAS AND ADDITIONAL MANAGEMENT MEASURES

A. Process for Identifying Critical Coastal Areas and Additional Management Measures is Not Effective

Comment: One comment states that Oregon's process for identifying critical coastal areas and the need for additional management measures, which relies largely on the state's Clean Water Act section 303(d) listing process for impaired waters and TMDL program, is flawed in several ways. Specifically, the commenter believes Oregon's Clean Water Act section 303(d) listing process is not effective. The comment asserts that the State fails to meet the 303(d) list regulatory requirements to "assemble and evaluate all existing and readily available water quality related data and information to develop the list" and that the State does not use nonpoint source assessments to develop its 303(d) lists. The commenter also asserts that Oregon ignores a variety of technical information available to help identify land uses

⁶ Cong. Rec. E3589-E3590, Oct. 27, 1990

that consistently cause or contribute to water quality standard violations. In addition, the commenter noted that Oregon does not use TMDLs to identify critical coastal areas and assess where existing CZARA management measures are not adequate for meeting water quality standards, as required for CZARA approval. The commenter also notes that the associated TMDL water quality management plans do not support an effective coastal nonpoint program. For example, despite the numerous temperature TMDLs that have been developed in Oregon's coastal watershed, the comment asserts that load allocations have not been used to determine minimum riparian buffer width, height, or density to achieve the load allocation.

Source: 57-KK, 57-LL, 57-MM, 57-NN, 57-QQ, 57-RR, 57-SS, 57-TT

Response: NOAA and EPA did not propose a finding on the approvability of Oregon's process for identifying critical coastal areas and additional management measures and did not solicit comment on these issues at this time. The public will have an opportunity to comment on these aspects of Oregon's program at some point in the future before the agencies fully approve Oregon's coastal nonpoint program.

B. NOAA and EPA Lack Authority to Require Additional Management Measures

Comment: Two commenters stated NOAA and EPA do not have the authority to require Oregon to develop additional management measures that go beyond the original management measures in the CZARA guidance. They noted that the programmatic guidance for the Coastal Nonpoint Program calls on the State, not NOAA and EPA, to identify additional management measures, if necessary, to achieve and maintain water quality standards. They further noted that the guidance indicates that the State is to identify additional management measures only within State-designated critical coastal areas to address State-identified land uses that may cause or contribute to water quality degradation.

Source: 71-E, 71-I, 71-H, 77-D

Response: NOAA and EPA disagree with the claim that NOAA and EPA lack the authority to require Oregon to adopt additional management measures necessary to achieve and maintain water quality standards under CWA section 303 and to protect designated uses. The guidance cited is intended to assist the states to implement CZARA's required elements, but the authority for determining the need for additional management measures does not reside exclusively with the state. NOAA and EPA have the authority to impose additional management measures that are necessary to achieve applicable water quality standards. CZARA requires that a state program, provide for "[t]he implementation and continuing revision from time-to-time of additional management measures . . ." 16 U.S.C. 1445b(b)(3). The Act is not explicit about who is to impose these additional measures, however when read as a whole, the statute is clear that NOAA and EPA are intended to identify when management measures are necessary, and to provide technical guidance about what those measures should include. The programmatic guidance cited by the commenters is intended to assist the states in the implementation of CZARA's required elements, but the authority for determining the need for additional management measures does not reside exclusively at the state level. EPA additional measures States have flexibility to design the specific management measures necessary to meet water quality standards, but they do not have exclusive authority to identify when additional management measures are required.

Applicable legislative history supports this interpretation. An early version of the bill that would later become CZARA, provided that the entity responsible for determining when an additional management

measure is necessary is “the [state’s] coastal management agency, in cooperation with the State water quality authorities and other State or local authorities, as appropriate . . .”⁷ This language – giving states the authority to determine when additional measures were needed – was stricken from the bill prior to enactment, suggesting Congress intended to take a different approach. The language enacted is consistent with the overall design of CZARA –the agencies identify when management measures are necessary to meet applicable water quality standards, and the state then designs measures to meet this compliance benchmark.

C. NOAA and EPA Need to Impose New Additional Management Measures

Comment: Some commenters noted that CZARA requires Oregon to demonstrate that it has additional management measures in place to meet water quality standards and protect designated uses. The commenters noted that Oregon has not met this requirement since water quality standards are still not being met and designated uses are not being protected. They are supportive of placing additional management measure requirements on Oregon’s coastal nonpoint program and suggested specific measures or nonpoint source issues that the additional measures should address (see specific comments below).

Source: 15-G, 15-K, 15-M, 30-B, 30-O, 35-J, 44-C, 47-B, 56-C, 56-M, 57-CC, 60-E

Response: Beyond the requirements for additional management measures for forestry that NOAA and EPA placed on Oregon’s program during the 1998 conditional approval findings, the federal agencies believe specific additional management measures to address other coastal water quality issues are not needed at this time for CZARA approval. The other CZARA 6217(g) management measures are broad enough to protect water quality, when implemented effectively. For coastal nonpoint program approval purposes, CZARA does not require states to have clean water throughout their coastal nonpoint program management areas or to have additional management measures identified to address all water quality impairments. Rather, states, like Oregon, must have processes in place to identify and implement additional management measures, when needed (i.e., when the existing 6217(g) management measures are not sufficient for achieving water quality standards and protecting designated uses; - see Section 6217(b)). This process for identifying additional management measures is what NOAA and EPA will evaluate when the federal agencies are ready to approve Oregon’s program.

VI. PESTICIDES AND TOXICS—GENERAL

Note: NOAA and EPA received a variety of comments related to pesticides. Summaries of the general pesticide comments and the federal agencies’ responses are provided below. See Agriculture-Pesticides and Forestry-Pesticides for a full discussion of the comments received related to pesticides.

A. Adequacy of Oregon’s Coastal Nonpoint Program to Address Pesticides and Other Toxics

Comment: Several commenters noted that Oregon needs to improve how it addresses nonpoint source pollution caused by toxics, including pesticides, herbicides, and superfundSuperfund contaminants. Commenters specifically noted they believed there was excessive use of toxic chemicals in agriculture

⁷ 136 Cong. Rec. H8068-01 (Sept. 26, 1990), 1990 WL 148732 at *64.

and forestry practices. One commenter was also concerned about Superfund contamination impacting shellfish harvests.

Commenters expressed their concerns with the ability of Oregon's existing pesticide management program to protect the quality of water in streams and groundwater as well as protect human health and aquatic species and called for more federal oversight. One commenter supported this statement by citing results from a watershed council herbicide study that found that pesticides used along roadsides, agricultural fields, and forestry operations were all evident in Oregon's waterways. The commenter noted that while applicators may have applied the herbicide correctly, the study demonstrates runoff is still occurring, indicating that the state's rules are ineffective at protecting water quality from herbicide application. Several other commenters provided personal accounts of health impacts they believe to be due to pesticide exposure.

One commenter cited various studies to demonstrate pesticide impacts to human health and the environment from one commonly used herbicide, glyphosate. For example, a few studies in the late 1990s and early 2000s linked exposure to glyphosate to an increased risk of non-Hodgkin lymphoma. Other health effects from exposure to glyphosate described by the commenter included breast cancer, ADD/ADHD, increased risks of late abortion, endocrine disruption, and possible increased risk of multiple myeloma. According to studies from the late 2000s, glyphosate causes altered immune responses in fish, and Roundup, a commonly used glyphosate product, is lethal to amphibians. Other environmental impacts from glyphosate were also described. The commenter contended that these human health and environmental impacts have been attributed to exposure to levels of glyphosate below the EPA-established standards. The commenter also stated that studies show adverse health effects of other formulated glyphosate products.

Several commenters felt the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), coupled with the state's pesticide rules and its Water Quality Pesticide Management Plan, were insufficient to control polluted runoff from pesticide application to Oregon's coastal waters. Some commenters stated that Oregon needs to improve pesticide application restrictions and protections for all classes of streams. One commenter noted that neighboring states have stricter requirements for pesticide use and application. Another commenter cited the lack of additional ODA rules beyond the EPA pesticide labels as a demonstration of the rules' inadequacy to protect threatened coho salmon.

A few commenters stated that not only do they believe Oregon has weak pesticide laws but compliance with the existing rules is poor. One commenter suggests that federal label restrictions for atrazine are not being followed. Other commenters complained about the state's poor record keeping of pesticide application and inadequate notice of spraying events that are scheduled to occur near their neighborhoods and homes.

Other commenters disagreed. They believed Oregon has adequate pesticide controls in place which are consistent with CZARA 6217(g) requirements. They state that state rules (OAR 629-620-0400) provide for the protection of waters of the state and other resources during chemical application. In addition, applicators are required to follow the FIFRA label requirements and meet additional state requirements including when and under what conditions pesticides can be applied, mixed, stored, loaded, and used. The commenters also state that under state rules, applicators need to take into account weather conditions such as temperature, wind, and precipitation to protect non-target forest resources. A commenter also noted that the FIFRA labels have undergone significant changes since 1998 on how

pesticides can be applied to forests. In addition, the commenters assert that the EPA-approved Oregon Water Quality Pesticide Management Plan provides additional description of the state's approach to pesticide management.

Source: 2-B, 17-C, 27-C, 28-D, 31-D, 32-A, 35-F, 35-G, 38-A, 38-D, 41-A, 46-H, 46-M, 46-N, 49-H, 50-B, 54-G6, 54-B, 54-D, 54-F, 54-H, 54-I, 54-M, 54-N, 54-O, 54-Q, 54-R, 54-S, 55-P, 57-GG, 57-HH, 57-II, 57-ZZ, 57-II3, 70-B, 70-C, 70-I, 71-R, 71-AH, 71-AI, 71-AJ, 71-AK, 72-A, 77-S, 77-T, 81-B, 83-E, 83-M, 85-C, 85-D, 85-E

Response: NOAA and EPA recognize that many Oregonians are concerned about the use of pesticides and toxics in Oregon and the adverse impacts they have to the environment and public health. After carefully considering all comments received and available data, NOAA and EPA find that Oregon can do more to strengthen these programs to protect coastal water quality and designated uses, specifically with regard to the aerial application of herbicides (see rationale for additional management measures for forestry in final decision document for further discussion of the federal agencies' rationale for this finding). NOAA and EPA will continue to work with Oregon within the agencies' authorities to improve the state's pesticide management efforts to ensure coastal water quality, human health, and designated uses are protected.

Some commenters asserted that Oregon is not adequately enforcing its existing pesticide laws and that current label requirements are not being followed. EPA and NOAA recognize these concerns, however these issues are not something that CZARA considers for the approvability of a state's coastal nonpoint program (see Section IV.C, Enforcement).

Finally, regarding the expressed concern over superfundSuperfund contaminants, CZARA does not speak to superfund contaminants.Superfund contaminates. Rather Superfund contaminants are more appropriately addressed through the Comprehensive Environmental Response, Compensation, and Liability Act (the Superfund Act).

B. Pesticides—Adequacy of Overall Pesticide Monitoring Efforts

Comment: Several commenters believed Oregon should strengthen its pesticide monitoring efforts. They stated that Oregon does not have a program in place to determine if federal label requirements are being followed. Further they stated that monitoring is not being conducted widely and regularly for pesticide runoff. One commenter noted that while unknown and unmonitored pesticide uses are a problem, unknown and unmonitored health and environmental risks from pesticides also are a significant problem.

Commenters discussed various monitoring programs that are needed in Oregon, including programs to: monitor pesticide use and impacts; assess pesticide management bmps; monitor for pesticides in the air; monitor for air deposition; and monitor for pesticides in surface and drinking waters directly following an aerial spray event (rather than every three years). They also raised the need for monitoring programs to track whether federal label laws are being complied with. One commenter also noted that the Oregon lab that tests for pesticides does not have the capacity to test for glyphosate, a commonly used herbicide.

Another commenter stated that most pesticide risk assessments are based on old and incomplete data and endpoint evaluations and that these assessments need to be updated with more current information for a better understanding of the true impact of pesticides and acceptable exposure limits.

The commenter also stated that there is little to no understanding of effects from “inert” ingredients in pesticides, and that there needs to be more testing and disclosure of these inert ingredients.

A few commenters also objected to NOAA and EPA’s statement in the proposed decision document in which the agencies commended the state’s Water Quality Pesticide Management Plan and new pilot pesticide monitoring study. They did not think these programs should be praised as part of Oregon’s Coastal Nonpoint Program. The commenters did not believe the state’s claim that pesticide monitoring would support an adaptive approach and demonstrate when additional controls are needed. They stated that Oregon fails to conduct enough pesticide monitoring to support an adaptive approach and noted that none of the pilot monitoring sites are located in the coastal zone.

Other letters stated Oregon’s pesticide monitoring is adequate. Those comments contend that monitoring efforts have shown that current pesticide management practices do not result in detrimental impacts. For example, one commenter described a study by Dent and Robben (2000) on fish-bearing streams that found no pesticide contamination at or above 1 ppb in any of the post-spray water samples analyzed. According to the commenter, that study concluded that the current Forest Practices Act and pesticide rules are effective at protecting water quality along Type F (fish-bearing) and Type D (drinking water) streams. However, another commenter cited the same study asserted that the study may have underestimated pesticide levels.

Source: 54-E, 54-F, 54-S, 57-ZZ, 57-CF-B, 77-R

Response: NOAA and EPA acknowledge that limited studies in Oregon’s coastal areas have not found pesticides at levels toxic to primary consumers such as salmon. However, the federal agencies believe Oregon can do more to improve its pesticide monitoring and tracking efforts in the coastal areas. The federal agencies have revised the decision document to recommend some specific actions the state could take to improve its pesticide monitoring and tracking efforts, such as increasing monitoring on non-fish bearing streams in coastal areas and improving ODF’s Notification of Operation form to include protections for non-fish bearing streams. In addition, based on the comments received, NOAA and EPA also have revised the discussion of Oregon’s Water Quality and Pesticide Management Plan and pilot pesticide monitoring studies to acknowledge some of the weaknesses of the plan and pilot studies. (See additional management measures for forestry rationale in the final decision document).

VII. NEW DEVELOPMENT

Comment: Many commenters agreed with NOAA and EPA’s proposed finding that Oregon has failed to fully address CZARA requirements for new development, specifically that the state has not provided a commitment to use its back-up authorities to ensure implementation of the management measure requirements when needed. However, a few commenters did not believe Oregon had an effective program to control stormwater runoff from new development and meet water quality standards. They asserted that the state needed to do more than the voluntary program described. For example, one commenter believed that the TMDL Implementation Guidance must require (not recommend) DMAs to follow NPDES Phase II requirements for small MS4s. Another option that was suggested was that NOAA and EPA should require the state to incorporate the CZARA new development management measures into an existing NPDES General Permit or craft a new permit.

Not all commenters were supportive of new regulatory requirements to address the new development management measure. For example, one commenter preferred that the state use its existing authorities and stormwater permits more effectively rather than place additional requirements on small cities and counties. The commenter believed that small cities and counties are not the main source of impairment and often lack the technical expertise and financial resources to meet the new requirements and suggested the coverage for the 1200C NPDES general permit could be expanded by decreasing the acreage threshold for the permit or using an approach similar to the 1200OCS permit used to address water quality problems in the Columbia Slough.

Source: 11-B, 13-B, 15-G, 34-B, 34-C, 34-D, 80-C

Response: During the public comment period, NOAA and EPA received information from Oregon that has resulted in a shift in the federal agencies' position on the approvability of the State's approach to meeting this management measure. In its March 2014 submittal, Oregon presented a final version of its TMDL implementation plan guidance for managing post-construction stormwater. The state further provided information on how it will use the guidance to voluntarily implement the new development management measure, to track this implementation with milestones, and to use state regulatory authorities to accomplish the objective of this measure in the event that the State's voluntary approach falls short of meeting the tracked milestones. With the benefit of this new information, the federal agencies now believe that the previous condition placed on Oregon for meeting the New Development Management Measure no longer provides a basis for the determination that Oregon has failed to submit an approvable coastal nonpoint program.

Highlights of the state's approach for meeting the new development management measure include a recently expanded list of 11 designated MS4 communities within Oregon's coastal nonpoint management area that are now subject to NPDES Phase I or Phase II stormwater regulations, as well as Oregon's recently finalized TMDL implementation strategy (highlighting how it applies to implementing the new development management measure). Of the 51 non-MS4 communities across Oregon's coastal nonpoint management area, at least 38 communities likely will be required to implement post-construction stormwater management as a result of existing or pending TMDLs, with additional communities potentially brought into these efforts in the future. Collectively, these 49 communities/municipalities comprise approximately 92 percent of the combined population of the 62 communities across Oregon's coastal nonpoint management area.

VII. ONSITE SEWAGE DISPOSAL SYSTEMS

A. Adequacy of Oregon's Programs to Meet CZARA Requirements for OSDS

Comment: Many commenters agreed with NOAA and EPA's proposed finding that Oregon has failed to fully address CZARA requirements for existing onsite sewage disposal systems (OSDS), specifically ensuring routine inspections. While some commenters were supportive of the state's planned outreach efforts to promote voluntary inspections, they agreed with NOAA and EPA that Oregon does not have a tracking program in place to assess the effectiveness of its voluntary program nor has the state demonstrated a commitment to use its back-up enforcement authority to ensure inspections, when needed.

Other commenters were not supportive of Oregon's voluntary approach at all. They felt the state needed to require routine inspections and have more direct enforcement authorities. They believed that Oregon's OSDS management program was not sufficient for meeting water quality standards and that enforcement action was minimal for existing leaking septic systems. One commenter noted that Dunes City passed an OSDS ordinance to require routine inspections because previous voluntary approaches did not work. Another commenter was concerned about several communities (Lane County and the City of Florence) allowing septic systems to be cited near lakes.

Source: 11-B, 12-B, 13-B, 15-G, 34-B, 34-5, 35-E, 48-A, 48-K

Response: During the public comment period, NOAA and EPA received information from Oregon of its prior program submittals that has resulted in a shift in the federal agencies' position on the approvability of the State's approach to meeting this management measure. In its March 2014 submittal, Oregon presented a greatly expanded voluntary approach, with realistic milestones for implementing the inspections management measure element over time, a viable strategy for tracking this implementation, and a commitment to using its back-up enforcement authority to ensure implementation. CZARA does not require a regulatory approach for meeting the 762176217(g) management measures. NOAA and EPA guidance from 2001 allow voluntary approaches, provided that the following are in place: a description of the voluntary or incentive-based programs the states will use to encourage implementation of the management measures, including the methods for tracking and evaluating those programs; a legal opinion from the attorney general or an attorney representing the agency with jurisdiction for enforcement that such authorities can be used to prevent nonpoint pollution and require management measure implementation, as necessary; and a description of the mechanism or process that links the implementing agency with the enforcement agency and a commitment to use the existing enforcement authorities where necessary. Oregon has provided these items. Additionally, approximately 10 percent of the OSDS within the coastal nonpoint management area are alternative decentralized treatment systems with state requirements for service contracts with certified maintenance providers and for submittal of annual reports to local onsite management systems agents and Oregon DEQ.

The Oregon legislature passed a new law requiring greater disclosure by a seller of a property served by a septic system or alternative wastewater treatment system on the condition of that system. Oregon DEQ worked closely with the Oregon Association of Realtors to develop and provide training on the new law and to provide much greater homeowner education, and the parties entered into a multi-faceted formal partnership in November 2013 to cooperate on encouraging greater septic system inspections. Oregon believes the new seller disclosure requirement and educational efforts will raise awareness of OSDS issues and prompt buyers to obtain OSDS inspections as part of real estate transactions, similar to home inspections that are now routine for home sales. Additionally, in early 2014, Oregon launched its Septic Smart program, modeled after EPA's national Septic Smart initiative. The Oregon Septic Smart program is designed to help educate Oregonians about the importance of septic systems, septic system inspections and proper septic system maintenance through providing Oregonians with easy access to important information about their septic systems and with easy access to certified industry professionals that perform septic system inspections.

Oregon has established a goal with interim milestones for its voluntary incentive-based program, as well as a strategy for tracking and evaluating the strategy's effectiveness. Specifically, Oregon expects that within 15 years, these collective efforts will result in inspection of 95 percent of all the OSDS associated

with property transfers across the coastal nonpoint management area. Oregon DEQ has set an interim goal of inspections for 60 percent of residential property transfers involving OSDS in the coastal counties by 2014 and 80 percent by 2020. Oregon is tracking the effectiveness of the State's voluntary initiative, primarily through the annual reporting requirements by certified inspectors who participate in Oregon Septic Smart. While participation in Oregon Septic Smart is voluntary, it provides a competitive business advantage for certified inspectors. The annual reports require separate tracking of OSDS inspections associated with property transfers (versus inspections conducted for other reasons, which also are tracked). The report includes information on the number and outcomes of OSDS inspections. Collectively, these reports will help to guide outreach and enforcement efforts at the county level. This tracking will be augmented by information from lenders, brokers, realtor surveys, and GIS analysis.

Oregon has also committed to using existing legal authorities where necessary to implement the management measure. In the event the State's voluntary incentive-based approach falls short, Oregon has committed to use ORS 454.625 and ORS 468.020 to propose rules for adoption by the Oregon Environmental Quality Commission (EQC) to implement the inspections element of the operating OSDS management measure. In the event the EQC does not pass adequate rules, the Oregon Attorney General's Office has provided a legal opinion asserting that the State has adequate back-up authority (ORS 468B et. seq.) to require implementation of the 6217(g) management measures, as necessary. Specifically, the state has the authority under ORS 468B.015 and ORS 468B.020 to prevent and control pollution from any nonpoint source, including OSDS.

As for siting septic systems near lakes, Oregon has protective setback buffers in place for new systems near water bodies. CZARA requires protective setback buffers under a separate management measure for which NOAA and EPA have previously provided interim approval. While well-functioning septic systems can be protective of water quality, particularly when nitrogen reduction strategies are incorporated, not all systems are protective of water quality, especially older systems that have ceased to function properly or are not sited with sufficiently protective setbacks. This is why proactive inspection of septic systems is critical.

B. More Needed to Improve OSDS Management

Comment: A few commenters noted specific actions Oregon needs to take before NOAA and EPA approve the state's programs for meeting the OSDS management measure. Actions include: siting OSDS in locations where they are properly separated from groundwater; restricting system density to reduce nitrate input to groundwater; ensure proper sizing of the system to minimize concentrations of contaminants and prevent hydraulic overloading; requiring mandatory inspections every 3-5 years or at the time of property transfer; requiring mandatory pumping after each inspection whenever needed; establishing a step-by-step program for the state to help homeowners with grants and low-cost loans that need support for pumping or replacing failing systems; and establishing explicit enforcement mechanisms.

Source: 34-E, 48-J, 78-E

Response: NOAA and EPA agree that siting OSDS in locations where they are properly separated from groundwater, controlling nitrate inputs from septic systems, and ensuring proper sizing of OSDS are important. These components are requirements of the management measures for new OSDS. NOAA and EPA provided interim approval of the new OSDS management measure based on Oregon's requirements for ensuring that new septic systems are located away from unsuitable areas, with protective vertical

and horizontal separation distances from ground- and surface water resources, as well as steps that Oregon has taken to control excessive nitrogen loadings from new and existing OSDS. With regard to increasing the frequency of inspections existing OSDS, please refer to the response in section VII.A above.

C. Concerned with Sewage Discharge to Waterways During Rain Events

Comment: One commenter noted that some communities, such as Myrtle Point and Powers, discharge sewage during rain events, preventing shellfish harvest.

Source: 17-B

Response: The commenter asserts that heavy rains dump raw sewage into the Coquille River from Myrtle Point and Powers. The entire length of the Coquille River is currently listed as impaired for bacteria and other causes, and failing septic systems have been identified as a potential source for this impairment. Oregon DEQ is currently establishing a TMDL for these impairments and has a timetable for developing a TMDL implementation plan to meet the TMDL. Oregon DEQ also is committed to exercising its authority to require DMAs to develop and implement strategies for meeting water quality standards, and to track this implementation. NOAA and EPA believe that Oregon's new Septic Smart program to promote expanded inspections of septic systems will go a long way to prevent failures. NOAA and EPA further believe that Oregon has the necessary incentives and enforceable policies and mechanisms to ensure that the inspections element of the existing OSDS management measure is met.

NOAA and EPA Response to Comments Regarding the Agencies’ Proposed Finding that Oregon has
Failed to Submit a Fully Approvable Coastal Nonpoint Program

January 30, 2015

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Comment [CJ1]: Do you think we should include a list of acronyms as an appendix or at the beginning of the document?

Need to check for consistency on verb tenses, abbreviations and capitalization (state vs State for example), findings document vs decision document, commenter...their, finding to determination etc. Also may want to make a note that “he” could mean either “he or she”

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I. BACKGROUND

On December 20, 2013, the National Oceanic and Atmospheric Administration (NOAA) and the Environmental Protection Agency (EPA) announced a 90-day public comment period in the Federal Register, with regard to the agencies' intent to find that Oregon has failed to submit an approvable coastal nonpoint pollution control program (coastal nonpoint program) pursuant to Section 6217 of the Coastal Zone Act Reauthorization Amendments. The proposed findings document explained the federal agencies' rationale for this proposed decision.¹

Section 6217(a) of the Coastal Zone Act Reauthorization Amendments (CZARA), 16 U.S.C. section 1455b(a), requires that each state (or territory) with a coastal zone management program previously approved under section 306 of the Coastal Zone Management Act must prepare and submit to the federal agencies a coastal nonpoint pollution control program for approval by NOAA and EPA. For states with coastal zone management programs that were approved by NOAA prior to 1991, coastal nonpoint programs were to be submitted for approval by July 1995. Oregon submitted its coastal nonpoint program to the federal agencies for approval at that time. The federal agencies provided public notice of and invited public comment on their proposal to approve, with conditions, Oregon's coastal nonpoint program (62 FR 6216). The federal agencies approved the program by letter dated January 13, 1998, subject to the conditions specified in the letter (63 FR 11655).

Over time, Oregon made incremental changes to its program in order to satisfy the identified conditions. However, in the December 20, 2013, proposed findings document, NOAA and EPA determined that Oregon has not addressed all conditions placed on its program. Therefore the federal agencies proposed to find that the state has not submitted a fully approvable coastal nonpoint program.

NOAA and EPA's proposed findings focused on three conditions placed on Oregon's program—new development, onsite sewage disposal systems (OSDS), and additional management measures for forestry. In addition to seeking public comment on these proposed findings, the federal agencies also sought public comment on the adequacy of the State's programs and policies for meeting the 6217(g) agriculture management measures and conditions. The specific agriculture questions NOAA and EPA asked the public to respond to were: (1) Has the State satisfied the agriculture conditions placed on its coastal nonpoint program?; and (2) Does the State have programs and policies in place that provide for the implementation of the 6217(g) agriculture management measures to achieve and maintain water quality standards and protect designated uses?

NOAA and EPA received 85 comments during the 90-day public comment period.² Nearly all comments were unique; only three comments were identical. The majority of Many commenters (46) supported NOAA and EPA's proposed finding while 24 others opposed the proposed finding. Of the commenters that opposed the proposed finding, 15 some did so because they believed Oregon ~~had~~ has either fully met its CZARA obligations or just needs more time. The remaining, whereas nine comments opposed the finding on the grounds that NOAA and EPA should not withhold federal funding, which would be the a statutory consequence of finding that the state has failed to submit a fully approvable coastal nonpoint program. These latter nine letters in opposition comments largely took the position

Comment [PE2]: This seems like a useful paragraph for the findings as well. Or, for whichever section comes first in the FR.

Comment [PE3]: The majority of comment letters...

It seems potentially misleading to say the majority of commenters, because some letters were written on behalf of whole organizations or entities. Presumably all of their members should be thought of as commenters. Majority or minority, then, would be calculated by adding the numbers of the people represented by each letter.

If I was a member of a logging association and the associations' leadership communicated to me that the association as a whole had compiled comments for this federal decision, I would assume that the federal agencies would consider my associations' comments as representing the view of more people than a comment coming from a single individual. Or, vice versa, if I contribute to an environmental group who asks for funding in order to help them comment on my behalf, I expect them to communicate that their comments represent the view of their membership.

If we want to use terms like "majority" and "minority", we have to be careful about how we are counting or defining what a "commenter" is.

Comment [sjs4]: This is not an election. The numbers are not important. The persuasiveness or lack thereof by each is important. Agencies consider comments, not commenters.

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¹ See <http://coastalmanagement.noaa.gov/nonpoint/oregonDocket/OR%20CZARA%20Decision%20Doc%2012-20-13.pdf> for NOAA and EPA's proposed finding on Oregon's Coastal Nonpoint Program.

² See <http://coastalmanagement.noaa.gov/nonpoint/oregonDocket/publicComments.html> to view all comments received and who provided comments.

that ~~), although most acknowledged~~ the State needs to do more to protect water quality. The remaining ~~15 commenters~~ Several comments did not offer a specific ~~opinion~~ views on the proposed finding, but ~~although instead~~ commented on specific aspects of coastal nonpoint source pollution management in Oregon. ~~T, the majority~~ Most of those comments implied ~~took the position that believed the Sstate~~ needed ~~needed needed~~ to do more to protect coastal water quality.

Comment [sjs5]: Previous sentence said they offered no specific opinion. How is offering a specific opinion different from taking a position?

~~As a result of the~~ After considering comments received, including comments and an updated coastal nonpoint program submittal from the state, NOAA and EPA find that Oregon has failed to submit an approvable coastal nonpoint program under Section 6217 of the Coastal Zone Act Reauthorization Amendments.³

This document provides a summary of the public comments received and NOAA and EPA's response to those comments.

II. GENERAL COMMENTS

A. Proposed Finding

Comment: ~~The majority of commenters~~ Many comment letters supported NOAA and EPA's proposed finding that Oregon has failed to submit a fully approvable coastal nonpoint program under Section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA). In addition to specific concerns addressed in other sections below, commenters made a number of general comments. ~~One theme within these general comments is that although Oregon has been under administering an approved program subject to conditions al approval for its coastal nonpoint program noted that for 16 years, noted that 16 years after receiving conditional approval for its coastal nonpoint program,~~ Oregon still does not have a fully approvable program in place to control polluted runoff to coastal waters and protect designated uses. Another general theme is that the ~~sState has not, nor has the state~~ adopted additional management measures for forestry where water quality impairments and degradation of beneficial uses attributable to forestry exist despite implementation of the CZARA management measures developed under Section 6217(g). A number of commenters letters also noted that the ~~sState~~ failed to follow through on its 2010 commitments to NOAA and EPA to address three remaining conditions on its program related to new development, septic systems, and forestry by March 2013. ~~commitments~~

Ex. 5 - Deliberative

Ex. 5 - Attorney Client

While some commenters agreed that Oregon needs to do more to improve water quality, they did not agree with NOAA and EPA's proposed finding because they opposed withholding federal funding under CZMA Section 306 and CWA Section 319 (see Funding Section below for more discussion on this issue).

A few commenters noted NOAA and EPA should continue to work with Oregon to improve its water quality programs and that the ~~sState~~ just need ~~see~~ additional time to meet the CZARA requirements.

Ex. 5 - Deliberative

³ See [date] final decision document on Oregon's Coastal Nonpoint Program at ***.

⁴ The ~~Sstate~~ made ~~its~~ their commitments in a July 21, 2010, letter from Neil Mullane, Department of Environmental Quality, and Robert Bailey, Department of Land Conservation and Development, to Mike Bussell, Environmental Protection Agency Regional 10, and John King, National Oceanic and Atmospheric Administration.

Other commenters opposed NOAA and EPA’s proposed finding. They stated Oregon does have adequate programs in place to meet or exceed the CZARA requirements. More specific comments are discussed in sections below.

Source: 1-C, 2-B, 4-A, 5-A, 8-B, 9-A, 13-A, 14-A, 14-C, 15-A, 16-B, 17-A, 19-B, 22-A, 22-C, 23-A, 24-A, 25-A, 25-B, 26-B, 28-A, 30-A, 30-B, 30-H, 31-A, 33-A, 33-B, 34-A, 35-A, 36-A, 36-B, 36-C, 37-B, 37-C, 37-D, 40-A, 41-A, 42-A, 42-B, 43-A, 44-A, 44-B, 46-A, 47-A, 48-B, 49-A, 53-A, 52-A, 54-A, 55-B, 56-C, 57-A, 64-B, 64-D, 66-B, 66-D, 68-B, 68-D

Comment [AC9]: Note: Source codes are for Internal purposes only. We’ll delete all source info (or at least the comment # before we release).

Response: NOAA and EPA appreciate the many comments received in response to the federal agencies proposed finding to find that Oregon has failed to submit an approvable program under Section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA). After carefully considering all comments received and the sState’s March 20, 2014, response to the proposed finding, NOAA and EPA ~~continue to find that Oregon has failed to submit an approvable program. As described more fully in the final findings document,~~ Although Oregon has made tremendous progress in addressing many of the original conditions associated with approval of ~~placed on the sState’s program, the sState has not met revised and implemented the condition related to additional management measures for forestry and forest lands that are necessary to achieve and maintain water quality standards and to protect designated uses. The basis for this finding is explained more fully in the determination final findings document.~~ Therefore After consideration of public comments received, NOAA and EPA find that the sState has failed to submit a fully approvable program under Section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA). The two federal agencies will begin withholding federal grant assistance funds are directed under CZARA.

Comment [sjs10]: THIS action would be the first actual finding.

~~Per the statute, beginning with FY 2015 federal funding, NOAA will withhold 30 percent of funding for Oregon under Section 306 of the Coastal Zone Management Act that supports implementation of the state’s coastal management program and EPA will withhold 30 percent of funding for Oregon under Section 319 of the Clean Water Act that supports implementation of the state’s nonpoint source management program.~~

Comment [sjs11]: Unnecessary (at least in this level of detail) in a comment-response document.

Although some commenters would prefer urged NOAA and EPA to provide Oregon with additional time to develop and implement additional management measures (as necessary to achieve and maintain water quality standards and to protect designated uses) fully approvable program and not to withhold funding to the sState, the based on the CZARA statute and the settlement agreement with the Northwest Environmental Advocates, NOAA and EPA does not have afford the federal agencies with that flexibility. The Northwest Environmental Advocates sued NOAA and EPA in 2009 challenging the agencies’ failure to take a final action on the approval (without conditions) or disapproval of Oregon’s coastal nonpoint program and failure to withhold funds from Oregon for not having a fully approved program. NOAA and EPA settled the lawsuit in 2010 and agreed make a final finding on the approvability of the program by May 15, 2014, (extended to January 30, 2015, by mutual agreement of the settlement agreement parties).

Comment [sjs12]: If this is mentioned at all, it should appear in the background section, not in response to comments.

B- State Legislature Has Been Obstructing ODEQ’s Ability to Make Changes

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Comment: One commenter letter stated that the Oregon Department of Environmental Quality (DEQ) has been working hard to get the improvements needed to improve water quality and meet all coastal nonpoint program requirements. However the State Legislature has been obstructing DEQ’s progress and is the one that needs to take action.

Comment [PC13]: Is there a quote to this effect or is this our language? If there is a quote, use it and signify it as such. If not, preface this sentence with the following: “A commenter stated that...”

Source: 25-C

Response: The federal agencies ~~cannot~~ do not attempt to address or consider the role of the ~~State legislature in making the agencies' final determination~~ in the course of the federal agencies' findings on Oregon's program. ~~is not based on opinions about whether the state legislature has been "obstructing" progress.~~ NOAA and EPA have been working closely with DEQ, the Department of Land Conservation and Development (DLCD), and other agencies to complete the development of the state's coastal nonpoint program. We commend the agencies for the ~~changes~~ progress they have made to strengthen Oregon's coastal nonpoint program and address many of the remaining conditions. Ultimately, CZARA refers to actions by a "State" collectively and does not distinguish between or among various branches within or departments of state governments.

Comment [CJ14]: Avoid repeating the use of inflammatory language.

C.B. Federal and State Governments Have Responsibility to Manage Waters

Comment: One ~~commenter~~ comment letter stated that the Federal and state governments have a responsibility to manage waters in the public trust for maximum long-term benefit for current and future generations. They noted this was not being done. ~~The commenter did not provide any additional information explaining the basis for this belief position.~~

Comment [AC15]: Note: The commenter didn't expound on their reasoning here. They just said it wasn't being done.

Source: 22-C

Response: Federal and ~~State~~ governments do have a responsibility to manage public waters for current and future generations. Congress created CZARA as a tool for NOAA and EPA, along with our ~~State~~ partners, to use to help protect coastal waters. NOAA and EPA strive to carry out these responsibilities within the constructs of federal statute and associated guidance.

Comment [L16]: Are ALL 85 comments directly addressed one way or another in this doc? If not, I suggest that this one could drop as being quite vague. If so, OK to keep in

III. FUNDING

A. Impacts of Withholding Funds

Comment: ~~Some Comment letters highlighted~~ Commenters recognized that withholding funds under Section 306 of the Coastal Zone Management Act (CZMA) and Section 319 of the Clean Water Act (CWA) could negatively impact Oregon's ability to improve water quality and support beneficial programs such as Total Maximum Daily Loads (TMDLs), Oregon Watershed Enhancement Board (OWEB) watershed planning and restoration projects, local land use planning, as well as the ~~State's~~ ability to provide technical assistance to coastal communities to address pressing coastal management issues such as coastal hazards, stormwater management, and growth management. A few comment letters ~~commenters~~ argued against NOAA and EPA withholding funds from these programs because they felt withholding funding from two important programs for addressing polluted runoff and coastal habitat issues in the ~~State~~ is counterproductive to accomplishing the goals of these programs and unlikely to result in the policy and programmatic changes NOAA and EPA are seeking. Others noted that withholding funding would hurt two ~~State~~ programs and agencies, Oregon's Coastal Management Program in the Department of Land and Conservation and Development and Oregon's Nonpoint Source Management Program in the Department of Environmental Quality, that have very little (if any) influence over some of the most significant remaining issues (i.e., forestry and agriculture). Some commenters also noted that withholding funds would negatively impact coastal communities and watershed groups that also rely on this funding from NOAA and EPA.

Other commenters supported withholding funds even though they acknowledged it may have some negative impacts initially. They saw withholding funding as the only way to get further action in the ~~State~~ to improve water quality and protect designated uses. One comment letter ~~commenter~~ also noted

that NOAA and EPA’s failure to withhold funding sooner allowed Oregon to “limp along for over 16 years with inadequate management measures for its coastal nonpoint program while drinking water and other water quality impairments occurred.”

Source: 1-C, 5-A, 8-B, 14-C, 16-B, 17-A, 25-A, 25-B, 25-D, 25-E, 25-F, 33-A, 33-B, 36-A, 36-B, 36-C, 37-B, 37-C, 37-D, 43-A, 48-B, 55-B, 64-B, 66-B, 68-B,

~~Response: The statute directs NOAA and EPA to withhold funding when the agencies find that a state has failed to submit an approvable coastal nonpoint program (as is the case with Oregon).~~ ~~Response:~~ NOAA and EPA recognize that withholding funding under Section 306 of the CZMA and Section 319 of the CWA could make it more difficult for Oregon to maintain the same level of effort on key programs that help improve water quality and protect salmon habitat, such as the state’s coastal management, TMDL, and nonpoint source programs. However, the penalty provision in CZARA appears to have been designed to provide a financial disincentive to states to encourage states to develop fully approvable coastal nonpoint programs in a timely manner to provide better protection for coastal water quality. ~~The statute directs NOAA and EPA to withhold funding when the agencies find that a state has failed to submit an approvable coastal nonpoint program (as is the case with Oregon).~~ NOAA and EPA will continue to work with Oregon to complete the development of its coastal nonpoint program so that the funding reductions from the penalties can be eliminated as soon as possible.

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Comment [PE17]: I would replace this with “incentive”.

Comment [LP18]: This sentence can read that it is a disincentive for the state to develop a fully approvable coast NP program.

B. Oregon Stands to Lose \$4 million per Year in Federal Funding

~~Comment:~~ Several comment letterscommenters stated that if NOAA and EPA’s proposed finding that Oregon has failed to submit a fully approvable coastal nonpoint program stands, Oregon would lose \$4 million a year in federal funding.

Source: 1-C, 14-C, 43-A

~~Response:~~ NOAA and EPA would like to correct this statement. Each year that Oregon fails to submit an approvable programThe comment appears to over-estimate the amount of federal grant funds subject to withholding. For each calendar year, beginning with federal FY 2015, Oregon fails to submit an approvable program, the state is subject to losinglosingCZARA directs the withholding of -30 percent of itsa state’s allocations under Section 306 of the CZMA and Section 319 of the Clean Water Act for each year that state lacks a fully approvable coastal nonpoint program. For FY 2015, Oregon’s total allocation under these two programs is approximately only about\$*** in federal funding, representing: Therefore, the state would lose a total of \$*** for \$** for CZMA Section 306 and \$** for CWA Section 319 purposes).

Comment [WD19]: ~\$4M (placeholder)

Comment [WD20]: ~\$1.2M (placeholder)

Comment [WD21]: \$0.6M (placeholder)

Comment [WD22]: \$0.6M (placeholder)

III. AUTHORITIES UNDER THE COASTAL ZONE ACT REAUTHORIZATION AMENDMENTS (CZARA)

A. Suitability of Voluntary Approaches Backed By Enforceable Authorities

~~Comment:~~ Several comment letterscommenters noted that CZARA requires coastal states to have enforceable mechanisms for each management measure. ~~They~~These letters registered dissatisfaction yThey were not satisfied with the voluntary approaches Oregon wasis using to address many CZARA management measure requirements. ~~They~~These lettersyThey noted that theOregon’s voluntary

Ex. 5 - Deliberative

approaches ~~were~~ were not being adhered to and that Oregon ~~was~~ was not using its back-up authority to enforce and ensure implementation of the CZARA management measures, when needed. A few ~~comment letter~~ commenters also noted that Oregon ~~had~~ had not described the link between the enforcement agency and implementing agency and the process the agencies will use to take enforcement action when voluntary approaches are not adequate to protect water quality. Another ~~commenter stated~~ comment letter ~~commenter noted~~ that voluntary approaches will not work and that the state ~~needed~~ needed to adopt approaches that could be enforced directly.

Source: ~~15-C, 15-D, 16-A, 28-E, 30-O, 46-H, 49-J~~

Response: States must have enforceable policies and mechanisms to implement the CZARA management measures (see Section 306(d)(16) of the Coastal Zone Management Act). As the NOAA and EPA January 1993 *Coastal Nonpoint Pollution Control Program Development and Approval Guidance* states, the federal agencies have interpreted the statutory provisions to mean that “these enforceable policies and mechanisms may be state or local regulatory controls, and/or non-regulatory incentive programs combined with state enforcement authority.” Therefore, voluntary, incentive-based programs are acceptable approaches for meeting the CZARA management measure requirements as long as ~~the~~ state ~~has~~ can demonstrated it has adequate back-up authority to ensure implementation of the CZARA ~~managements~~ management measures, when necessary.

For coastal nonpoint program approval, CZARA requires NOAA and EPA to assess whether or not ~~the~~ coastal state with an approved CZM program “provides for the implementation” of 6217(g) management measures (Section 6217(b)). To do this, NOAA and EPA examine whether the state has processes in place that are backed by enforceable policies and mechanisms to implement the 6217(g) management measures. In approving a state’s coastal nonpoint program, NOAA and EPA ~~cannot~~ have not retroactively evaluated ~~consider how well those processes, including voluntary ones, are~~ have worked ~~ing or been ing-enforced~~; rather, the federal agencies ~~we~~ we require ~~the~~ have accepted such measures when the state ~~to~~ provides the following:

1. a legal opinion from the attorney general or an attorney representing the agency with jurisdiction for enforcement that such authorities can be used to prevent nonpoint pollution and require management measure implementation, as necessary;
2. a description of the voluntary or incentive-based programs, including the methods for tracking and evaluating those programs, the states will use to encourage implementation of the management measures; and
3. a description of the mechanism or process that links the implementing agency with the enforcement agency and a commitment to use the existing enforcement authorities where necessary.

(See *Final Administrative Changes to the Coastal Nonpoint Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 and Enforceable Policies and Mechanisms for State Coastal Nonpoint Programs*.)⁵ The latter two provisions in the third item ensure that such programs, even though implemented through voluntary measures, are, at their core, “enforceable policies and mechanisms” as provided in the statute.

⁵ Both guidance documents are available at <http://coast.noaa.gov/czm/pollutioncontrol/>.

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Ex. 5 - Deliberative

Comment [CJ27]: Consistency on whether we use third person (federal agencies) or not or even if it matters.

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Program implementation, and evaluation of the effectiveness of that implementation, occurs after coastal nonpoint program approval, and the opportunity for evaluation of the effectiveness of that implementation is available under other statutory mechanisms. Section 6217(c)(2) of CZARA ~~and directs participating~~ enables states to implement their approved programs through changes to their nonpoint source management plan, approved under Section 319 of the Clean Water Act, and through changes to its coastal zone management program, developed under Section 306 of the Coastal Zone Management Act. Therefore, NOAA and EPA have ~~some ability~~ an opportunity to evaluate ~~how well a state's~~ whether a state's implementation of its coastal nonpoint program through routine assessment mechanisms ~~offer the~~ offer such a state's Nonpoint Source Management Program and Coastal Management Program.

Comment [PC28]: Ideally, perhaps, but in reality there's usually a record of implementation that we did not ignore with respect to forestry.

Ex. 5 - Deliberative

~~In Contrary For~~ Regardless, for the new development and onsite sewage disposal system management measures, ~~Contrary In c~~ Contrary to a few commenters, the federal agencies do believe the State of Oregon has sufficiently demonstrated the link between implementing and enforcing agencies, as well as a commitment to use that authority, for the new development and onsite sewage disposal system management measures. However, ~~With regard to management measures for forestry, NOAA and EPA agree with the commenter position assertion that the sState has not met all the requirements for relying criteria enabling it to rely on voluntary programs, backed by enforceable authorities, to demonstrate its "enforceable policies and mechanisms," to address its conditions related to additional management measures for forestry.~~ The ~~rationales for those conditions in the final findings document on Oregon's Coastal Nonpoint Program explain why the bases for NOAA and EPA have made these findings on the State's proffered reliance on voluntary measures to address additional management measures for forestry and forested lands that are necessary to meet water quality standards and to protect designated uses.~~

B. Federal Government Taking Over Oregon's Coastal Nonpoint Program

Comment: One ~~comment letter~~ commenter noted that NOAA and EPA have an obligation to step in for Oregon and take over its coastal nonpoint pollution control program since the state lacks the will to address its polluted runoff issues.

Source: 55-C

Response: Unlike some of the EPA water quality programs under the Clean Water Act, such as the National Pollutant Discharge Elimination System (NPDES) Program, CZARA provides for exclusive state and local decision-making regarding the specific land-use practices that will be used to meet the coastal nonpoint program management measures. The Coastal Zone Management Act program itself is voluntary for states in that a state may decline the federal grants available to states administering coastal zone management programs under that statute. Neither the Coastal Zone Management Act nor the Clean Water Act, much less the CZARA amendments, The Act does not provide NOAA or EPA with the authority to take over, or implement, a state's administer a coastal nonpoint pollution control program if the state fails to act declines to do so.

C. Oregon Needs More Time to Develop Its Coastal Nonpoint Program

Comment: A few ~~comment letter~~ commenters stated that NOAA and EPA should give Oregon additional time to develop a fully approvable coastal nonpoint program. They noted that developing a program and addressing the remaining conditions NOAA and EPA placed on the sState's program is very challenging and that the sState has made significant progress in meeting the identified conditions since

gaining conditional approval subject to conditions. They also noted that the State is continuing to make additional improvements, such as the current rulemaking process by the Oregon Board of Forestry to achieve better riparian protection for fish-bearing streams, and but that the State needs more time before the new rule is adopted.

A few other comment letter commenters noted that Oregon has had plenty of time to address deficiencies since receiving conditional approval for its coastal nonpoint program in 1998, and those commenters believed that water quality is no better now than it was 16 years ago.

Source: 14-D, 33-C, 28-F

Response: NOAA and EPA have already provided Oregon sufficient time to develop a fully approvable coastal nonpoint program. The federal agencies agree that the State has met many of the conditions associated with the earlier approval, and that the federal agencies would otherwise be prepared to invite public comment on their tentative approval of those conditions. Per a settlement agreement with the Northwest Environmental Advocates, the federal agencies agreed to must make a final finding by May 15, 2014, (subsequently extended to January 30, 2015, by mutual agreement of the settlement agreement parties), regarding whether or not Oregon has failed to submit an approved (without conditions) coastal nonpoint program. NOAA and EPA proposed to find that the State failed to submit an approvable program based on commitments made by the State to the federal agencies in 2010. Since that time, not only has the State not made progress on its 2010 commitments, it has not offered any alternatives to its earlier commitments. As applicable to forestry and forested lands, development and implementation of additional management measures remain necessary to achieve and maintain water quality standards and to protect designated uses.

Comment [KT32]: This portion of the comment is not on the same topic. Can we take this out? Otherwise it seems to beg a response.

Comment [sjs33]: Delete this paragraph or change the caption and respond to the comment.

Comment [PC34]: Reiterate that Oregon's been at it for 16 years.

D. CZARA Requires State to Address Issues Outside of Its Control

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Comment: One comment letter commenter disagreed with the Coastal Nonpoint Program regarding its requirement that "states" have to meet all CZARA management measures. They noted that some measures, such as onsite sewage disposal systems (OSDS), are often addressed at the local level, and are therefore, outside of the state's jurisdiction.

Source: 10-B

Response: NOAA and EPA disagree with the commenter position that states should not be required to meet the full suite of management measures in the 6217(g) guidance. The CZARA amendments statute requires all coastal states participating in the National Coastal Zone Management Program to develop coastal nonpoint programs that "provide for the implementation, at a minimum, of management measures in conformity with the guidance published under subsection (g), to protect coastal waters..." (See Section 6217 (b), 16 U.S.C. 1455b(b)). The 1993 guidance EPA developed to comply with subsection (g), *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*, outlines two management measures related to new and existing OSDS that states must address.

With regard to the two OSDS management measures, all coastal states have exercised state-wide authority to regulate many aspects of OSDS, such as siting requirements and what qualifications are needed to inspect OSDS. NOAA and EPA acknowledge appreciate that many states have been reluctant to require inspections of OSDS at the state level, but that reluctance should not be confused with an inherent limitation of state powers. From a practical standpoint, NOAA and EPA recognize that local governments often play a significant role in managing OSDS, and the federal agencies have therefore

accepted a variety of approaches from coastal states for meeting the OSDS management measures, as well as other measures, including those that have relied on a mixture of state and local-level authorities, local efforts with sufficient geographic coverage, or state-led voluntary approaches backed by enforceable authorities.

~~E-D.~~ NOAA and EPA Holding Oregon to a Higher Standard

Comment: One ~~comment letter~~commenter stated that NOAA and EPA ~~we are~~were holding Oregon to a higher standard than other states. ~~He further stated, and that r. Raising. Raising~~ The comment asserts that the higher approval threshold for Oregon (compared to other states) ~~was is~~unfair to Oregon ~~and~~. That comment letter suggested that NOAA and EPA ~~should~~focus on helping Oregon meet the previously established minimum standards for other state coastal nonpoint programs rather than requiring ~~requiring~~requiring Oregon to meet a higher bar.

Source: 10-A

Response: NOAA and EPA have not been provided evidence that Oregon is being held to a higher standard than other states, ~~and the agencies have~~has implemented processes to ensure that this has not happened. The CZARA statutory requirements and guidance that the federal agencies use to evaluate Oregon's program are the same as ~~that is~~as those that have been ~~that is~~used applied to evaluate the approvability of every other ~~state's~~state's-state's-state's-state's program. NOAA and EPA required California, Oregon and Washington to develop additional management measures for forestry that went beyond the basic CZARA 6217(g) forestry management measures. Oregon, along with Washington and California, have also did receive had conditions placed on their programs, requiring them the states to develop additional management measures for forestry that went beyond the basic CZARA 6217(g) forestry management measures. The additional management measures were identified as conditions on approval is was done in recognition of based on the need for the to protection of endangered and threatened salmon species; the more stringent to achieve and maintain protective water quality requirements standards for the protection of for designated uses for salmonids; and the significance of timber harvesting impact effects on water quality across these the Pacific Northwest states. Oregon, Washington, and California continued to experience adverse impacts to salmon and salmon habitat due to forestry activities despite Even though Oregon, Washington, and California had having had programs in place to satisfy the standard suite of 6217(g) forestry management measures, impacts to salmon and salmon habitat were still occurring due to forestry activities. As a result, so additional management measures for forestry were needed.

Comment [JG35]: Can we switch this statement around to start with NOAA and EPA have implemented processes....and have not been provided evidence. It sounds a bit too defensive and reactive this way.

Comment [sjs36]: Or just change the response to something like "The comment does not elaborate on how or why the approval standards applied to Oregon are different than those applied to other states."

Comment [sjs37]: I thought it was just Oregon and Washington, but not California (where the coastal zone itself is so much narrower than coastal zones of Oregon or Washington).

Comment [CJ38]: California is not considered Pacific NW. Could replace with "western coastal states"

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~~F-E.~~ Need to Take a Tailored Approach to NPS Control

Comment: A few ~~commenters~~comment lettercommenters were concerned asserted that NOAA and EPA ~~we are~~were applying a "one-size-fits all" approach to addressing nonpoint source pollution in Oregon by requiring the sState to meet specific national management measures. They felt

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that a more tailored approach that considers Oregon's specific circumstances would be more appropriate.

Source: 8-C, 10-E

Comment [sjs41]: Did they suggest what these might be? If so, include them in the comment. If not, then say in the response that they did not identify Oregon-specific circumstances in their comment.

Comment [sjs42]: Did the comment suggest HOW to tailor the approach? Same as previous. If yes, include it here. If not, say they did not.

Response: By its nature, CZARA givesaffords states great deferencesignificant flexibility to develop programs that are consistent with the broad national 6217(g) management measure requirements, yet are tailored to meet a state's specific circumstances. Section 6217 does not provide NOAA or EPA with authority to require states or local governments to take specific actions to address coastal nonpoint source pollution, and in specifying conditions on approval that additional management measures were necessary to meet water quality standards and uses, NOAA and EPA did not do so. Rather, NOAA and EPA work with theassist each participating coastal state to find the best approach for each state that is consistent with the overarching CZARA requirements.

As required by section 6217 (g), in 1993 EPA published *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*. The guidance specifies 56 management measures that form the core requirements of a state's coastal nonpoint program. While the guidance establishes baseline standards for addressing broad categories and sources of nonpoint source pollutants, there are many different approaches that states such as Oregon can take, or have taken, totake to be consistent with the 6217(g) management measure requirements. For each management measure, the guidance provides examples of a variety of different things states to could can do to satisfy the requirements for of the management measure. Further, Further, todate, NOAA and EPA have approved -- without conditions -- 22 state coastal nonpoint pollution control programs have received full approval of their coastal nonpoint pollution control programs developed under CZARA, and theThe publically availablet the approval documents, publically available on NOAA's coastal nonpoint program website, demonstrate animpressive variety of state-specific approaches.

While NOAA and EPA have provided Oregon with various recommended suggestions for addressing various management measures and approaches to meet the 6217(g) management measures built around Oregon's own approaches for controlling coastal nonpoint pollution, decisions regarding about which to develop, adopt, and implement how to specific expand these approaches to meetaddress the management measures rests with the sState.

G. Coastal Nonpoint Program Needs to Address Climate Change

Comment: One comment lettercommenter noted that Oregon's Coastal Nonpoint Program needs to address climate change, water shortages, and toxins, as these will become even more pressing issues as the climate continues to change.

Source: 50-A

Response: Climate change is an important issue facing coastal states and can have anmay contribute to adverse impacts to on-coastal water quality. NOAA and EPA take climate change very seriously and are involved in a number of initiatives to help states and other entities become moreimprove the resiliency of coastal communities in response to the impacts of climate change. For example, through the National Coastal Zone Management Program, NOAA has been providing financial and technical assistance to Oregon to encourage local governments to incorporate hazards and climate change considerations and hazards into their local comprehensive plans. Specifically, NOAA and Oregon have been working with local governments to plan for and reduce exposure to climate-related natural

hazards in Oregon's coastal zone. Additionally, EPA requires state Nonpoint Source Management Programs, including Oregon's program, to be updated every five years, and under EPA's EPA guidance require, these updates are required to include be well integrated with climate change planning efforts, where applicable.

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However, Neither the CZARA amendments itself does nor the 1993 guidance under section 6217(g) specifically identified management measures not have any specific requirements for states to address applicable to management of climate change effects through their state coastal nonpoint programs. When approving state coastal nonpoint programs, NOAA and EPA ensure that must make sure each state programs provide for implementation of management measures in conformity with satisfies the requirements laid out in the 1993 *Guidance Specifying Management Measures for Sources of Nonpoint Source Pollution in Coastal Waters*, developed pursuant to Section 6217(g). Section 6217(b)(3) provides for additional management measures that are necessary to achieve and maintain water quality standards under the Clean Water Act and to protect designated uses. The 1993 guidance only contains a few mentions of climate change in the discussion of several suggested best management practices that a state could employ to implement the particular management measure. The discussion for the new onsite sewage disposal system management measure, for example, notes mentions that the rate of sea level rise should be considered when siting onsite sewage disposal systems and the discussion for the stream bank and shoreline erosion management measure notes that setback regulations should recognize that special features of the stream bank streambank or shoreline, may change, providing an example of beaches and wetlands that are expected to migrate landward due to rising water levels as a result of global warming. However, none of these The illustrative examples, however, are not required elements for a state's coastal nonpoint program. Implementation of some measures nonetheless results in reduced stressors on coastal water quality, and reduced pollutant loads, which ultimately should help improve coastal resiliency in the face of adverse effects of climate change.

Comment [L44]: Is there any value in noting that the MMs themselves should help coastal waters in general, through reduced stressors and pollutant loads, which ultimately may help them be more resilient to CC impacts

H. Proposed Finding Exceeds NOAA and EPA's Authority

Comment: One commenter stated comment letter not stated commenter noted that the federal government places too many regulations on the states, private property owners, and individuals and that NOAA and EPA exceeded the limits defined by the U.S. Constitution. The comment letter commenter suggested that Congress should remove the budgets for NOAA and EPA and return those funds back to the state.

Source: 29-A

Response: Congress created the Coastal Nonpoint Program under Section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA) of 1990. In doing so, Congress charged NOAA and EPA to jointly administer the program. In finding that Oregon has failed to submit an approvable coastal program, NOAA and EPA are simply carrying out their administrative responsibilities under CZARA.

I. The Public Comment Period Is Not Needed

Comment: One comment letter commenter questioned why NOAA and EPA requested public comment on their proposed finding. They noted public comment should was not be needed as so long as the federal agencies' finding and analysis is based on established criteria and valid science (and, which they believed this to be the case).

Source: 15-B

Response: NOAA and EPA appreciate the commenter's assessment that the federal agencies' finding and analysis is based on established criteria and valid science. However, ~~public~~ Public comment ~~is participation has served as an essential part of the federal agencies' decision making processes for Oregon's administration of their responsibilities related to the Coastal Nonpoint Program. CZARA notes that "opportunities for public participation in all aspects of the program, including the use of public notices and opportunities for comment..." shall be incorporated into state coastal management programs. Therefore, Consistent with the public participation policies in the Coastal Zone Management Act and the Clean Water Act, NOAA and EPA would be remiss if the federal agencies did not have historically considered public input when making a findings about whether or not the state's has failed to submit an approvable coastal nonpoint program.~~

Comment [LP45]: Do not need this sentence – A reader may interpret this sentence as defensive and/or coming from an "ego" perspective.

IV. GENERAL—WATER QUALITY, MONITORING, AND ENFORCEMENT

A. Status of Oregon Coastal Water Quality Should Inform NOAA and EPA Decision

Comment: Many ~~comment letter~~ commenters expressed the need for Oregon to do more to improve coastal water quality and protect designated uses. They believe the fact that many coastal water quality problems in the ~~s~~State still exist demonstrates that Oregon's existing programs to control coastal nonpoint source pollution are inadequate and that the ~~s~~State needs to do more to strengthen its coastal nonpoint pollution control program. Specific concerns cited included failure to meet water quality standards, ~~specifically, numerous TMDLs for temperature, sediment, and/or toxics;~~ impaired drinking water; and recent federal species listings under the Endangered Species Act for salmon, salmon habitat, amphibians, and wildlife. For example, several ~~commenters' letters~~ commenters' letters cited the recent federal listings ~~for~~ for ~~for~~ for Southern Oregon-Northern California Coast coho salmon as illustrative of how salmon populations and habitat have continued to decline, due, in part, to human-related water quality and habitat impairments. Commenters ~~believes~~ specifically called out assert that activities from timber harvesting, agriculture, and urban development are the as a reason for contribute to these impairments. Commenters also ~~stated~~ assert that Oregon fails to identify land uses causing water quality impairments or threatening water quality because the ~~s~~State ignores technical information available about land uses that consistently cause or contribute to violations of water quality standards in coastal watersheds.

Several other ~~commenters' letter~~ commenters' letters noted that recent improvements in Oregon's coastal water quality and salmon runs demonstrate that the ~~s~~State's coastal nonpoint pollution control program is effective. One ~~commenter letter~~ commenter letter stated that Oregon streams are among the cleanest in the country and provide good water for aquaculture. A few other ~~commenters' letters~~ commenters' letters noted the good work and water quality and habitat improvements ~~made~~ being accomplished by watershed groups, the Oregon Watershed Enhancement Board (OWEB), and Soil and Water Conservation Districts (SWCDs). They also noted, and the voluntary efforts being undertaken by the timber industry and farmers (cattlemen) ~~have implemented on their own.~~ For example, one ~~comment letter~~ comment letter described how federal, state, county and private citizen groups have effectively worked together to improve the Tillamook watershed. They ~~commenter~~ commenter cited an Oregon Department of Fish and Wildlife study ~~that shows many of indicating that out-migrating and returning salmon to Tillamook State forest land as demonstrate ing the results of this restoration work.~~ and described how collaborative restoration efforts of federal, state, county and private citizen groups have effectively worked together to improve the Tillamook watershed. Another ~~commenter letter~~ commenter letter stated there was too much focus on the need to see water quality improvements, and

that given the increase in human population and other development pressures in recent decades, even maintaining water quality levels should be considered a success.

Source: 1-A, 1-B, 5-B, 8-A, 10-C, 11-A, 14-B, 15-E, 19-B, 19-E, 20-A, 20-D, 22-D, 25-A, 26-A, 28-F, 30-B, 30-I, 30-O, 31-B, 35-A, 35-B, 35-C, 39-A, 42-B, 42-C, 42-I, 43-F, 44-B, 48-C, 56-B, 57-GG, 57-NN, 57-VV, 82-C, 82-E, 83-C, 83-D

Response: NOAA and EPA recognize that the achievements of voluntary programs, such as those implemented by OWEB and SWCDs, play an important role in nonpoint source management and improving water quality improvements in coastal Oregon. Oregon does have has experienced some noteworthy successes, such as returning salmon populations to the Tillamook watershed. However, as other commenters pointed out and the the sState's most recent Clean Water Act section 303(d) list of waters not meeting water quality standards reflects, Oregon still grapples with impaired waterbodies that continue to are not achieving water quality standards or supporting designated uses, such as domestic water supply (drinking water) and fish and aquatic life (e.g.i.e., salmon). As stated in the CZARA amendments statute, the purpose of a state coastal nonpoint program is should be to "develop and implement management measures for nonpoint source pollution to restore and protect coastal waters," and therefore monitoring is an essential activity for determining the success of a state program.

However, CZARA does not require states to have clean water throughout their coastal nonpoint program management areas before receiving full approval from NOAA and EPA for their coastal nonpoint programs. Rather, CZARA employs an adaptive management approach. States, such as Oregon, must have processes in place to implement the 6217(g) management measures as well as to identify and implement additional management measures when needed to achieve water quality standards and to protect designated uses (see Section 6217(b)).

The legislative history (floor statement of Rep. Gerry Studds, House sponsor of section 6217)) indicates that implementation of the section 6217(g) management measures is "intentionally divorced from identified water quality problems because of the enormous difficulty of establishing cause and effect linkages between particular land use activities and specific water quality problems." Therefore, as noted above, when deciding whether or not to fully approve a state's coastal nonpoint program, NOAA and EPA assess whether or not a state has appropriate technology technically achievable and financially-based management measures in place. The agencies do not attempt to make cause-and-effect associations between specific, not whether the approaches and the achievement of effectively achieve water quality standards, nor attempt to tie specific management measures or or their absence to and the current status of the state's water quality.

B. Need Improved Water Quality Monitoring

Note: See also specific comments related to Agriculture-Monitoring and Tracking, Pesticides-Monitoring and Tracking, and Forestry-Pesticides.

Comment: Several comments commenters expressed letters stated concern about the adequacy of Oregon's water quality monitoring programs, especially with regard to related to monitoring after aerial application of pesticides and herbicides on forest lands. Commenters stated noted that Oregon does not have monitoring programs in place to adequately assess whether pollution controls are achieving their goals and protecting water quality. Therefore, it is difficult for the sState to determine if and when additional management measures are needed, as CZARA requires.

Comment [KT46]: Do we need to respond to this comment below? Include brief explanation of water quality standards and antidegradation provisions under the CWA?

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Comment [KT48]: Do we need to include the sentence about monitoring here? It does not seem specifically responsive to the preceeding comments.

Comment [L49]: Seems like a nonsequitur here – monitoring not mentioned immediately before or after.

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Commenters suggested several different monitoring approaches that Oregon ~~should~~ could implement to adequately protect water quality. These included: requiring turbidity monitoring of streams during and after rainstorms and taking enforcement action when excess turbidity is found; requiring recurrent road surface condition monitoring; requiring more frequent inspections of drinking water, especially when pesticide spraying occurs; and improving upon a recently developed strategy for determining agricultural landowners' compliance with water quality rules.

Several other ~~commenters~~ letters stated that Oregon's monitoring and tracking programs were adequate and commended the sState's greater focus on water quality monitoring over the past few years.

Source: 2-A, 30-R, 42-G, 42-H, 46-H, 49-I, 57-BB, 71-??, 84-??.

Response: NOAA and EPA ~~appreciate recognize commenters~~ commenters' concerns are concerned about the adequacy of Oregon's water quality monitoring programs, ~~and whether that the existing monitoring efforts are not robust enough to observe potential impacts from pesticide application and from other land uses and to determine when and if additional management measures are needed. The federal~~ The federal agencies agree that for some issues, e.g., pesticide effects in Type N streams, monitoring data may be insufficient. However the ~~The agencies also recognize Oregon's efforts over the past few years to improve its water quality monitoring efforts, such as the state's Enterprise Monitoring Initiative, and strongly encourage the state to make continued improvements ion monitoring and tracking of coastal nonpoint source pollution, water quality improvements and best management practice implementation within the coastal nonpoint management area.~~

However, NOAA and EPA did not propose a finding on the approvability of the overall monitoring and tracking elements of Oregon's Coastal Nonpoint Program and did not solicit comment on this issue at this time. The public will have an opportunity to comment on this aspect of Oregon's program at some point in the future before the agencies fully approve Oregon's coastal nonpoint program. (See also the appropriate Forestry and Agriculture sections in this document for responses to specific comments about the monitoring and tracking efforts related to Oregon's forestry and agriculture programs.)

C. Enforcement

Comment: One commenter noted that Oregon fails to systematically address water quality standard violations caused by excess sedimentation.

Source: 57-UU

Response: CZARA requires state coastal nonpoint programs to "provide for the implementation" of the 6217(g) management measures (Section 6217(b)). NOAA and EPA have identified sediment impacts from forestry activities that have not been addressed through the standard suite of management measures and have required Oregon to address sediment impacts through additional management measures for forestry and on forested lands.

~~Beyond requiring additional management measures for forestry that are designed to address excess sedimentation from timber activities, implementation~~ implementation of Oregon's coastal nonpoint program and evaluation of the effectiveness of that program will occur after federal program approval. Section 6217(c)(2) of CZARA provides for ~~calls on~~ states to implement their approved programs through changes to their nonpoint source management plan, approved under Section 319 of the Clean Water

Comment [L56]: I believe edits reflect what's intended. As written it sounded like agencies affirmatively believe OR's monitoring program is inadequate. I view the point I added re: type N streams as optional, but it does echo what we said in findings doc

Comment [CJ57]: Not sure what is meant by "other land uses" – that the monitoring efforts not robust enough to observe impacts from other land uses?

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Comment [sjs59]: Also, there is so much strike out in this response, I don't know what is intended and what isn't.

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Comment [PE61]: The rationale document, as currently written, does mention the "overall" monitoring program.

Act, and through changes to its coastal zone management program, developed under Section 306 of the Coastal Zone Management Act. Therefore, NOAA and EPA evaluate how well a state is implementing its coastal nonpoint program through routine assessment mechanisms for the state's Nonpoint Source Management Program and Coastal Management Program.

Finally, as stated in the introductory chapter of the 6217(g) guidance, *Guidance Specifying Management Measures for Sources of Nonpoint Source Pollution in Coastal Waters*, the legislative history (floor statement of Rep. Gerry Studds, House sponsor of section 6217) acknowledges that the management measures are based on technical and economic achievability rather than achieving particular water quality standards.⁶ The legislative history indicates that implementation of management measures was “intentionally divorced from identified water quality problems because of the enormous difficulty of establishing cause and effect linkages between particular land use activities and specific water quality

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If, after implementing the technology-based 6217(g) management measures, water quality impairments are still occurring, then CZARA employs an adaptive management approach. The Act requires states to provide for the implementation of additional management measures within identified areas to address land uses that are either currently causing water quality impairments or where reasonably foreseeable new or expanding land uses could threaten coastal water quality (Section 6217 (b)(3)).

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V. CRITICAL COASTAL AREAS AND ADDITIONAL MANAGEMENT MEASURES

A. Process for Identifying Critical Coastal Areas and Additional Management Measures is Not Effective

Comment: One ~~comment letter~~commenter states that Oregon’s process for identifying critical coastal areas and the need for additional management measures, which relies largely on the state’s Clean Water Act section 303(d) listing process for impaired waters and TMDL program, is flawed in several ways. Specifically, the commenter believes Oregon’s Clean Water Act section 303(d) listing process is not effective. The comment asserts that the Sstate fails to meet the 303(d) list regulatory requirements to “assemble and evaluate all existing and readily available water quality related data and information to develop the list” and that the sState does not use nonpoint source assessments to develop its 303(d) lists. The commenter also ~~states~~asserts that Oregon ignores a variety of technical information available to help identify land uses that consistently cause or contribute to water quality standard violations. In addition, the commenter noted that Oregon does not use TMDLs to identify critical coastal areas and assess where existing CZARA management measures are not adequate for meeting water quality standards, as required for CZARA approval. The commenter also notes that the associated TMDL water quality management plans do not support an effective coastal nonpoint program. For example, despite the numerous temperature TMDLs that have been developed in Oregon’s coastal watershed, ~~they~~the

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Comment [sjs64]: I agree that this elaborating paragraph should be deleted.

⁶ Cong. Rec. E3589-E3590, Oct. 27, 1990

commenters they asserts that load allocations have not been used to determine minimum riparian buffer width, height, or density to achieve the load allocation.

Source: 57-KK, 57-LL, 57-MM, 57-NN, 57-QQ, 57-RR, 57-SS, 57-TT

Response: NOAA and EPA did not propose a finding on the approvability of Oregon's process for identifying critical coastal areas and additional management measures and did not solicit comment on these issues at this time. The public will have an opportunity to comment on these aspects of Oregon's program at some point in the future before the agencies fully approve Oregon's coastal nonpoint program.

B. NOAA and EPA Lack Authority to Require Additional Management Measures

Comment: Two commenters stated NOAA and EPA do not have the authority to require Oregon to develop additional management measures that go beyond the original management measures in the CZARA guidance. They noted that the programmatic guidance for the Coastal Nonpoint Program calls on the sState, not NOAA and EPA, to identify additional management measures, if necessary, to achieve and maintain water quality standards. They further noted that the guidance indicates that the sState is to identify additional management measures only within sState-designated critical coastal areas to address sState-identified land uses that may cause or contribute to water quality degradation.

Source: 71-E, 71-I, 71-H, 77-D

Response: NOAA and EPA disagree with the commenters' commenters' commenters' that claim that NOAA and EPA lack the authority to require Oregon to adopt additional management measures necessary to achieve and maintain water quality standards under CWA section 303 and to protect designated uses. The guidance cited is intended to assist the states implement to implement to implementing implement CZARA's required elements, but the authority for determining the need for additional management measures does not reside exclusively with the state. NOAA and EPA have the authority to impose additional management measures that are necessary to achieve applicable water quality standards. CZARA requires that a state program, among other things, provide for "[t]he implementation and continuing revision from time-to-time of additional management measures . . ." 16 U.S.C. 1445b(b)(3). The Act is not explicit about who is to impose these additional measures, (it is drafted in the passive voice); however, when read as a whole, the statute is clear that NOAA and EPA the agencies are intended to identify when management measures are necessary, and to provide technical guidance about what those measure should include, disagree with the commenters that claim that NOAA and EPA lack the authority to require Oregon to adopt additional management measures. The programmatic guidance cited by the commenters is intended to assist the states in the implemeimplementation of n CZARA's required elements, but the authority for determining the need for additional management measures does not reside exclusively at the state level with the state. NOAA and EPA have the authority to impose additional management measures that are necessary to achieve applicable water quality standards. CZARA requires that a state program, among other things, provide for "[t]he implementation and continuing revision from time-to-time of additional management measures . . ." 16 U.S.C. 1445b(b)(3). The Act is not explicit about who is to impose these additional measures (it is drafted in the passive voice); however, when read as a whole, the statute is clear that EPA the agencies are intended to identify when additional management measures are necessary, and to provide technical guidance about what those measures measure should include. States may have flexibility to design the specific management measures necessary to meet water quality standards, but they do not have exclusive authority to identify when additional management measures are required.

Comment [CJ65]: I don't understand this sentence. Is this what you mean? "Despite the numerous temperature TMDLs that have been developed in Oregon's coastal watershed, the TMDLs do not include information on minimum riparian buffer width, height, or density to achieve the load allocation."

Comment [CJ66]: Maybe we should discuss if we know the response, should we go ahead and provide it or be consistent in using the standard language of not providing substantive responses to aspects of Oregon's program we did not solicit comment for? Or is this not worth a discussion as we have already made that decision to use the standard language?

Comment [AC67]: This would also be fairly easy to respond to based on what CZARA requires: processes for IDing land uses, CCAs, and add MMs within those CCAs to address problem land uses which the state has. For approval purposes, we do not evaluate how well these processes are being implemented (see response to "Enforcement" comment above). However, while it could be helpful to get that out now, it goes against our decision not to provide substantive responses to aspects of Oregon's program we did not solicit comment for.

Comment [AC68]: This would also be fairly easy to respond to based on what CZARA requires: processes for IDing land uses, CCAs, and add MMs within those CCAs to address problem land uses which the state has. For approval purposes, we do not evaluate how well these processes are being implemented (see response to "Enforcement" comment above). However, while it could be helpful to get that out now, it goes against our decision not to provide substantive responses to aspects of Oregon's program we did not solicit comment for.

Comment [AC69]: This would also be fairly easy to respond to based on what CZARA requires: processes for IDing land uses, CCAs, and add MMs within those CCAs to address problem land uses which the state has. For approval purposes, we do not evaluate how well these processes are being implemented (see response to "Enforcement" comment above). However, while it could be helpful to get that out now, it goes against our decision ... [1]

Comment [sjs70]: Too many edits in this paragraph to know what I should be reviewing.

Comment [sjs71]: The comment said that the guidances calls on states to identify measures, not EPA/NOAA. Do they cite to a page number or numbers?

Ex. 5 - Attorney Client

Applicable legislative history supports this interpretation. An early version of the bill that would later become CZARA, provided that the entity responsible for determining when an additional management measure is necessary is “the [state’s] coastal management agency, in cooperation with the State water quality authorities and other State or local authorities, as appropriate”⁷ This language – giving states the authority to determine when additional measures were needed – was stricken from the bill prior to enactment, suggesting Congress intended to take a different approach. The language enacted is consistent with the overall design of CZARA –the agencies identify when management measures are necessary to meet applicable water quality standards, and the state then designs measures to meet this compliance benchmark.

Comment [sjs74]: I stopped reviewing here in the interest of time and jumped ahead to forestry

C. NOAA and EPA Need to Impose New Additional Management Measures

Comment: Some commenters noted that CZARA requires Oregon to demonstrate that it has additional management measures in place to meet water quality standards and protect designated uses. The commenters noted that Oregon has not met this requirement since water quality standards are still not being met and designated uses are not being protected. They are supportive of placing additional management measure requirements on Oregon’s coastal nonpoint program and suggested specific measures or nonpoint source issues that the additional measures should ~~needed to~~ address (see specific comments below).

Source: 15-G, 15-K, 15-M, 30-B, 30-O, 35-J, 44-C, 47-B, 56-C, 56-M, 57-CC, 60-E

Response: Beyond the requirements for additional management measures for forestry that NOAA and EPA placed on Oregon’s program during the 1998 conditional approval findings, the federal agencies believe specific additional management measures to address other coastal water quality issues are not needed at this time for CZARA approval. The other CZARA 6217(g) management measures are broad enough to protect water quality, when implemented effectively. For coastal nonpoint program approval purposes, CZARA does not require states to have clean water throughout their coastal nonpoint program management areas or to have additional management measures identified to address all water quality impairments. Rather, states, like Oregon, must have processes in place to identify and implement additional management measures, when needed (i.e., when the existing 6217(g) management measures are not sufficient for achieving water quality standards and protecting designated uses ~~to~~ ~~to~~ see Section 6217(b)). This process for identifying additional management measures is what NOAA and EPA will evaluate ~~with~~ when the federal agencies are ready to approve Oregon’s program.

VI. PESTICIDES AND TOXICS—GENERAL

Note: NOAA and EPA received a variety of comments related to pesticides. Summaries of the general pesticide comments and the federal agencies’ responses are provided below ~~here~~. See Agriculture-Pesticides and Forestry-Pesticides for a full discussion of the comments received related to pesticides.

⁷ 136 Cong. Rec. H8068-01 (Sept. 26, 1990), 1990 WL 148732 at *64.

A. Adequacy of Oregon's Coastal Nonpoint Program to Address Pesticides and Other Toxics

Comment: Several commenters noted that Oregon needs to improve how it addresses nonpoint source pollution caused by toxics, including pesticides, herbicides, and ~~superfund~~ superfund contaminants. Commenters specifically noted they believed there was excessive use of toxic chemicals in agriculture and forestry practices. One commenter was also concerned about ~~superfund~~ superfund contamination impacting shellfish harvests.

Comment [CJ75]: Not sure whether we should be more generic and use "toxic and hazardous" instead of Superfund as Superfund is a program, not contaminants. Alternatively, could say something like contaminants covered under CERCLA (also known as Superfund).

Comment [CJ76]: See above comment.

Commenters expressed their concerns with the ability of Oregon's existing pesticide management program to protect the quality of water in streams and groundwater as well as protect human health and aquatic species and called for more federal oversight. One commenter supported this statement by citing results from a watershed council herbicide study that found that pesticides used along roadsides, agricultural fields, and forestry operations were all evident in Oregon's waterways. ~~They~~ The ~~commenter~~ commenter noted that while applicators may have applied the herbicide correctly, the study demonstrates runoff is still occurring, indicating that the state's rules are ineffective at protecting water quality from herbicide application. Several other commenters provided personal accounts of health impacts they believe to be due to pesticide exposure.

Comment [L77]: Important qualifier

One commenter cited various studies to demonstrate pesticide impacts to human health and the environment from one commonly used herbicide, glyphosate. For example, a few studies in the late 1990s and early 2000s linked exposure to glyphosate to an increased risk of non-Hodgkin lymphoma. Other health effects from exposure to glyphosate described by the commenter included breast cancer, ADD/ADHD, increased risks of late abortion, endocrine disruption, and possible increased risk of multiple myeloma. According to studies from the late 2000s, glyphosate causes altered immune responses in fish, and Roundup, a commonly used glyphosate product, is lethal to amphibians. Other environmental impacts from glyphosate were also described. The commenter contended that these human health and environmental impacts have been attributed to exposure to levels of glyphosate below the EPA ~~established~~ set standards. The commenter also stated that studies show adverse health effects of other formulated glyphosate products.

Comment [CJ78]: Is this more explanation than needed for the purpose of the Q&A?

Several commenters ~~also~~ felt the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), coupled with the state's pesticide rules and its Water Quality Pesticide Management Plan, were insufficient to control polluted runoff from pesticide application to Oregon's coastal waters. Some commenters stated that Oregon needs to improve pesticide application restrictions and protections for all classes of streams. One commenter noted that neighboring states have stricter requirements for pesticide use and application. Another commenter cited the lack of additional ODA rules beyond the EPA pesticide labels ~~as a -which they state have been demonstrated demonstration of the rules' eddemonstrated to be~~ inadequacy to protect threatened coho salmon.

A few commenters ~~also~~ stated that not only do they believe Oregon has weak pesticide laws but compliance with the existing rules is poor. One commenter ~~asserted that evidence suggested suggested suggested~~ that federal label restrictions for atrazine are not being followed. Other commenters complained about the state's poor record keeping of pesticide application and inadequate notice of spraying events ~~thatscheduled tothat would~~ occur near their neighborhoods and homes.

Other commenters disagreed. They believed Oregon has adequate pesticide controls in place which are consistent with CZARA 6217(g) requirements. They state that state rules (OAR 629-620-0400) provide for the protection of waters of the state and other resources during chemical application. In addition,

applicators are required to follow the FIFRA label requirements and meet additional state requirements such as for ~~including when and during~~ under what conditions pesticides can be applied, mixed, stored, loaded, and used. The ~~commenter~~ ~~commenter~~ also states that under state rules, applicators need to take into account weather conditions such as temperature, wind, and precipitation to protect non-target forest resources. A commenter also noted that the FIFRA labels have undergone significant changes since 1998 on how pesticides can be applied to forests. In addition, ~~they~~ ~~the commenters~~ ~~they~~ assert that the EPA-approved Oregon Water Quality Pesticide Management Plan provides additional description of the state's approach to pesticide management.

Source: 2-B, 17-C, 27-C, 28-D, 31-D, 32-A, 35-F, 35-G, 38-A, 38-D, 41-A, 46-H, 46-M, 46-N, 49-H, 50-B, 54-G6, 54-B, 54-D, 54-F, 54-H, 54-I, 54-M, 54-N, 54-O, 54-Q, 54-R, 54-S, 55-P, 57-GG, 57-HH, 57-II, 57-ZZ, 57-I13, 70-B, 70-C, 70-I, 71-R, 71-AH, 71-AI, 71-AJ, 71-AK, 72-A, 77-S, 77-T, 81-B, 83-E, 83-M, 85-C, 85-D, 85-E

Response: NOAA and EPA recognize that many Oregonians are concerned about the use of pesticides and toxics in Oregon and the adverse impacts they have to the environment and public health. After carefully considering all comments received and available data, NOAA and EPA find that Oregon can ~~to~~ do more to strengthen these programs to protect coastal water quality and designated uses, specifically ~~in with~~ regard to the aerial application of herbicides. ~~(See~~ ~~See~~ rationale for additional management measures for forestry in final decision document for further discussion of the federal agencies' rationale for this finding). NOAA and EPA will continue to work with Oregon within ~~the agencies'~~ ~~our~~ authorities, to improve ~~the state's~~ ~~its~~ pesticide management efforts to ensure coastal water quality, human health, and designated uses are protected.

~~While~~ ~~Some~~ commenters asserted that Oregon ~~was~~ ~~is~~ not adequately enforcing its existing pesticide laws and that current label requirements ~~were~~ not being followed. EPA and NOAA recognize these concerns, however, ~~these issues are not something that CZARA considers for the approvability of a state's coastal nonpoint program (see Section IV.C, Enforcement), as NOAA and EPA explained in the agencies' response to general comments about the enforcement of coastal nonpoint program elements, how well a state is enforcing or implementing its existing authorities is not something that CZARA considers for the approvability of a state's coastal nonpoint program. (See Section IV.C, Enforcement)~~

Finally, regarding the expressed concern over ~~superfund~~ ~~superfund~~ contaminants, CZARA does not speak to ~~superfund~~ ~~contaminates~~. ~~superfund~~ ~~contaminates~~. Rather ~~superfund~~ contaminants are more appropriately addressed through the Comprehensive Environmental Response, Compensation, and Liability Act (the Superfund Act).

Comment [CJ79]: See above comment.

B. Pesticides—Adequacy of Overall Pesticide Monitoring Efforts

Comment: Several commenters ~~believed~~ ~~noted the need for~~ Oregon ~~should~~ ~~to~~ strengthen its pesticide monitoring efforts. They stated that Oregon ~~does~~ not have a program in place to determine if federal label requirements are being followed. Further they stated that monitoring is not being conducted, ~~nor~~ ~~did it monitor~~ widely and regularly for pesticide runoff. One commenter noted that while unknown and unmonitored pesticide uses are a problem, unknown and unmonitored health and environmental risks from pesticides ~~also~~ ~~are also~~ a significant problem.

Commenters discussed various monitoring programs that are needed in Oregon, including programs to: monitor pesticide use and impacts; assess ~~whether pesticide management bmps~~practices are sufficiently reducing pollution and improving water quality; monitor for pesticides in the air; ~~monitor for , which eventually deposit onto surface waters and soils~~air deposition; and; ~~monitor for pesticides in coastal watersheds;~~ monitor for pesticides in surface and drinking waters directly following an aerial spray event (rather than ~~more frequently than every three years~~)~~such as directly following an aerial spray event~~. They also raised the need for; ~~and~~ monitoring programs to track whether federal label laws are being complied with. One commenter also noted that the Oregon lab that tests for pesticides does not have the capacity to test for glyphosate, a commonly used herbicide.

Another commenter ~~also~~stated that most pesticide risk assessments are based on old and incomplete data and endpoint evaluations and that these assessments needed to be updated with more current information for a better understanding of the true impact of pesticides and acceptable exposure limits. The commenter also stated that ~~in addition there was is~~ little to no understanding of effects from “inert” ingredients in pesticides, ~~and . The commenter believed that there needed~~neededneeded to be more testing and disclosure of these inert ingredients.

A few commenters also objected to NOAA and EPA’s statement in the proposed decision document ~~commendinged~~commendedin which the agencies ~~commended~~commendedingcommended the state’s Water Quality Pesticide Management Plan and new pilot pesticide monitoring study. They did not think these programs should be praised as part of Oregon’s Coastal Nonpoint Program. The commenters did not believe the state’s claim that pesticide monitoring would support an adaptive approach and demonstrate when additional controls are needed. They stated that Oregon fails tohas conducted enoughvery little pesticide monitoring to supportdrive an adaptive approach and noted that none of the pilot monitoring sites are located in the coastal zone.

~~While the above commenters expressed were concerned~~concern that ~~ed~~concerned with the minimal existing pesticide monitoring that occurred in Oregon was not sufficient to reveal the true impact of pesticides on the environment and humans, a few ~~o~~Other other commenters believedstated letters stated Oregon’s pesticide monitoring was adequate. ~~They~~Those comment~~ey~~They contend that monitoring efforts have shown that current pesticide management practices do not result in detrimental impacts. For example, one commenter described a study by Dent and Robben (2000) on fish-bearing streams ~~that~~which found no pesticide contamination at or above 1 ppb in any of the post-spray water samples analyzed. According to the commenter, thatThe study concluded ~~that~~that the current Forest Practices Act and pesticide rules are effective at protecting water quality along Type F (fish-bearing) and Type D (drinking water) streams. However, another commenter ~~that~~ ~~discussed~~citeddiscusseddiscussingeddiscussed the same study asserted that the study may have underestimated pesticide levels.

Source: 54-E, 54-F, 54-S, 57-ZZ, 57-CF-B, 77-R

Response: NOAA and EPA acknowledge that limited studies in Oregon’s coastal areas have not found pesticides at toxic levels. levels toxic to primary consumers such as salmonlevels. However, the federal agencies believe Oregon can do more to improve its pesticide monitoring and tracking efforts in the coastal areas. The federal agencies have revised the decision document to recommend some specific actions the state could take to improve its pesticide monitoring and tracking efforts, such as increasing monitoring on non-fish bearing streams in coastal areas and improving ODF’s Notification of Operation

Comment [L80]: Not sure if my edits are right but this statement needs qualification along the lines of decision doc on pesticides issue

form to include protections for non-fish bearing streams. In addition, based on the comments received, NOAA and EPA ~~also have also revised its the the its~~ discussion of Oregon's Water Quality and Pesticide Management Plan and pilot pesticide monitoring studies to ~~more clearly~~ acknowledge some of the weaknesses of the plan and pilot studies. (See additional management measures for forestry rationale in the final decision document).

VII. NEW DEVELOPMENT

Comment: Many commenters agreed with NOAA and EPA's proposed finding that Oregon has failed to fully address CZARA requirements for new development, specifically that the state has not provided a commitment to use its back-up authorities to ensure implementation of the management measure requirements when needed. However, a few commenters did not believe Oregon had an effective program to control stormwater runoff from new development and meet water quality standards. They ~~asserted~~ noted that the state needed to do more than the voluntary program described. For example, one commenter ~~believed~~ noted that the TMDL Implementation Guidance must require (not recommend) DMAs to follow NPDES Phase II requirements for small MS4s. Another option that was suggested was that NOAA and EPA should require the state to incorporate the CZARA new development management measures into an existing NPDES General Permit or craft a new permit.

Not all commenters were supportive of new regulatory requirements to address the new development management measure. For example, one commenter preferred that the state use its existing authorities and stormwater permits more effectively rather than place additional requirements on small cities and counties. The commenter ~~believed~~ noted that small cities and counties are not the main source of impairment and often lack the technical expertise and financial resources to meet the new requirements ~~and~~. They suggested the coverage for the 1200C NPDES general permit could be expanded by decreasing the acreage threshold for the permit or using an approach similar to the 1200OCS permit used to address water quality problems in the Columbia Slough.

Source: 11-B, 13-B, 15-G, 34-B, 34-C, 34-D, 80-C

Response: During the public comment period, NOAA and EPA received information ~~a substantial update~~ from Oregon ~~of its prior program submittals~~ that has resulted in a shift in the federal agencies' position on the approvability of the State's approach to meeting this management measure. In its March 2014 ~~submittal~~ update, Oregon presented a final version of its TMDL implementation plan guidance for managing post-construction stormwater. The ~~ss~~State further provided information on how it will use the guidance to voluntarily implement the new development management measure, to track this implementation with milestones, and to use ~~ss~~State regulatory authorities to accomplish the objective of this measure in the event that the State's voluntary approach falls short of meeting the tracked milestones. With the benefit of this new information, the federal agencies now believe that the previous condition placed on Oregon for meeting the New Development Management Measure no longer provides a basis for the determination that Oregon has failed ~~ing failing~~ to submit an approvable coastal nonpoint program.

Highlights of the state's approach for meeting the new development management measure include a ~~recently~~ expanded list of 11 designated MS4 communities within Oregon's coastal nonpoint management area that are now subject to NPDES Phase I or Phase II stormwater regulations, as well as Oregon's recently finalized TMDL implementation strategy (highlighting how ~~as~~ it applies to

Comment [L81]: An observation is that the new dev't program description is much less detailed than the one for OSDS. The latter gives a clear sense of the specifics and agencies' rationale for finding them acceptable. This may be OK, as the new dev't approach defers to other programs like MS4 permits and TMDLs, but I thought it worth flagging for consideration.

implementing the new development management measure).¹ Of the 51 non-MS4 communities across Oregon's coastal nonpoint management area, at least 38 communities likely will ~~are likely to be~~ required to implement post-construction stormwater management as a result of existing or pending TMDLs, with additional communities potentially brought into these efforts in the future. Collectively, these 49 communities/municipalities comprise approximately 92 percent of the combined population of the 62 communities across Oregon's coastal nonpoint management area.

VII. ONSITE SEWAGE DISPOSAL SYSTEMS

A. Adequacy of Oregon's Programs to Meet CZARA Requirements for OSDs

Comment: Many commenters agreed with NOAA and EPA’s proposed finding that Oregon has failed to fully address CZARA requirements for existing onsite sewage disposal systems (OSDS), specifically ensuring routine inspections. While some commenters were supportive of the state’s planned outreach efforts to promote voluntary inspections, they agreed with NOAA and EPA that Oregon does not have a tracking program in place to assess the effectiveness of its voluntary program nor has the state demonstrated a commitment to use its back-up enforcement authority to ensure inspections, when needed.

Other commenters were not supportive of Oregon's voluntary approach at all. They felt the state needed to require routine inspections and have more direct enforcement authorities. They believed that ~~noted~~ Oregon's OSDS management program was not sufficient for meeting water quality standards and that enforcement action was minimal for existing leaking septic systems. One commenter noted that Dunes City passed an OSDS ordinance to require routine inspections because previous voluntary approaches did not work. Another commenter was concerned about several communities (Lane County and the City of Florence) allowing septic systems to be cited near lakes.

Source: 11-B, 12-B, 13-B, 15-G, 34-B, 34-5, 35-E, 48-A, 48-K

Response: During the public comment period, NOAA and EPA received an information substantial update from Oregon of its prior program submittals that has resulted in a shift in the federal agencies' position on the approvability of the State's approach to meeting this management measure. In its March 2014 submittal update, Oregon presented a greatly expanded voluntary approach, with realistic milestones for implementing the inspections management measure element over time, a viable strategy for tracking this implementation, and a commitment to using its back-up enforcement authority to ensure implementation. CZARA does not require a regulatory approach for meeting the 621762162176216217(g) management measures. NOAA and EPA guidance from 2001 allow voluntary approaches, provided that the following are in place: a description of the voluntary or incentive-based programs the states will use to encourage implementation of the management measures, including the methods for tracking and evaluating those programs; a legal opinion from the attorney general or an attorney representing the agency with jurisdiction for enforcement that such authorities can be used to prevent nonpoint pollution and require management measure implementation, as necessary; and a description of the mechanism or process that links the implementing agency with the enforcement agency and a commitment to use the existing enforcement authorities where necessary. Oregon has provided these items. Additionally, approximately 10 percent of the OSDS within the coastal nonpoint management area are alternative decentralized treatment systems with state requirements for service

contracts with certified maintenance providers and for submittal of annual reports to local onsite management systems agents and Oregon DEQ.

The Oregon legislature passed a new law requiring greater disclosure by a seller of a property served by a septic system or alternative wastewater treatment system on the condition of that system. Oregon DEQ worked closely with the Oregon Association of Realtors to develop and provide training on the new law and to provide much greater homeowner education, and the parties entered into a multi-faceted formal partnership in November 2013 to cooperate on encouraging greater septic system inspections. Oregon believes the new seller disclosure requirement and educational efforts will raise awareness of OSDS issues and prompt ~~many~~ buyers to obtain OSDS ~~inspections~~ inspection as part of real estate transactions, similar to home inspections that are now routine for home sales. Additionally, in early 2014, Oregon launched its Septic Smart program, modeled after EPA's national Septic Smart initiative. The Oregon Septic Smart program is designed to help educate Oregonians about the importance of septic systems, septic system inspections and proper septic system maintenance through providing Oregonians with easy access to important information about their septic systems and with easy access to certified industry professionals that perform septic system inspections.

Oregon has established a goal with interim milestones for its voluntary incentive-based program, as well as a strategy for tracking and evaluating the strategy's effectiveness. Specifically, Oregon expects that within 15 years, these collective efforts will result in inspection of 95 percent of all the OSDS associated with property transfers across the coastal nonpoint management area. Oregon DEQ has set an interim goal ~~of to achieve~~ inspections for 60 percent of residential property transfers involving OSDS in the coastal counties by 2014 and 80 percent by 2020. Oregon is tracking the effectiveness of the State's voluntary initiative, primarily through the annual reporting requirements by certified inspectors who participate in Oregon Septic Smart. While participation in Oregon Septic Smart is voluntary, it provides a competitive business advantage for certified inspectors. The annual reports require separate tracking of OSDS inspections associated with property transfers (versus inspections conducted for other reasons, which also are ~~also~~ tracked). The report includes information on the number and outcomes of OSDS inspections. Collectively, these reports will help to guide outreach and enforcement efforts at the county level. This tracking will be augmented by information from lenders, brokers, realtor surveys, and GIS analysis.

Oregon has also committed to using existing legal authorities where necessary to implement the management measure. In the event the State's voluntary incentive-based approach falls short, Oregon has committed to use ORS 454.625 and ORS 468.020 to propose rules for adoption by the Oregon Environmental Quality Commission (EQC) to implement the inspections element of the ~~o~~Operating OSDS management measure. In the event the EQC does not pass adequate rules, the Oregon Attorney General's Office has provided a legal opinion asserting that the State has adequate back-up authority (ORS 468B et. seq.) to require implementation of the 6217(g) management measures, as necessary. Specifically, the state has the authority under ORS 468B.015 and ORS 468B.020 to prevent and control pollution from any nonpoint source, including OSDS.

As for siting septic systems near lakes, Oregon has protective setback buffers in place for new systems near ~~and~~ water bodies, ~~which CZARA requires~~ protective setback buffers under a separate management measure for which NOAA and EPA have previously provided interim approval. While well-functioning septic systems can be protective of water quality, particularly when nitrogen reduction strategies are incorporated, not all systems are protective of water quality, especially older systems that

have ceased to function properly or are not sited with sufficiently protective setbacks. This is why proactive inspections of septic systems is critical.

B. More Needed to Improve OSDS Management

Comment: A few commenters noted specific actions Oregon needs to take before NOAA and EPA approve the state's programs for meeting the OSDS management measure. Actions include: siting OSDS in locations where they are properly separated from groundwater; restricting system density to reduce nitrate input to groundwater; ensure proper sizing of the system to minimize concentrations of contaminants and prevent hydraulic overloading; requiring mandatory inspections every 3-5 years or at the time of property transfer; requiring mandatory pumping after each inspection whenever needed; establishing a step-by-step program for the state to help homeowners with grants and low-cost loans that need support for pumping or replacing failing systems; and establishing explicit enforcement mechanisms.

Source: 34-E, 48-J, 78-E

Response: NOAA and EPA agree that siting OSDS in locations where they are properly separated from groundwater, controlling nitrate inputs from septic systems, and ensuring proper sizing of OSDS are important. These components are requirements of the management measures for new OSDS, which Oregon is not conditioned on. NOAA and EPA have provided interim approval of the new OSDS management measure based on Oregon's requirements for ensuring that new septic systems are located away from unsuitable areas, with protective vertical and horizontal separation distances from ground- and surface water resources, as well as steps that Oregon has taken to control excessive nitrogen loadings from new and existing OSDS. With regard to increasing the frequency of inspections existing OSDS, please refer to the response in section VII.A above.

C. Concerned with Sewage Discharge to Waterways During Rain Events

Comment: One commenter noted that some communities, such as Myrtle Point and Powers, discharge sewage during rain events, preventing shellfish harvest.

Source: 17-B

Comment [LP82]: Font issue

Response: The commenter asserts that heavy rains dump raw sewage into the Coquille River from Myrtle Point and Powers. The entire length of the Coquille River is currently listed as impaired for bacteria and other causes, and failing septic systems have been identified as a potential source for this impairment. Oregon DEQ is currently establishing a TMDL for these impairments and has a timetable for developing a TMDL implementation plan to meet the TMDL. OregonThe DEQ also is also committed to exercising its authority to require DMAs to develop and implement strategies for meeting water quality standards, and to track this implementation. NOAA and EPA believe that Oregon's new Septic Smart program to promote expanded inspections of septic systems will go a long way to prevent failures. NOAA and EPA further believe that Oregon has the necessary incentives and enforceable policies and mechanisms to ensure that the inspections element of the existing OSDS management measure is met.

Comment [LP83]: Font issue

Page 18: [1] Comment [AC69]

Allison Castellan

11/1/2014 12:25:00 PM

This would also be fairly easy to respond to based on what CZARA requires: processes for IDing land uses, CCAs, and add MMs within those CCAs to address problem land uses which the state has. For approval purposes, we do not evaluate how well these processes are being implemented (see response to “Enforcement” comment above). However, while it could be helpful to get that out now, it goes against our decision not to provide substantive responses to aspects of Oregon’s program we did not solicit comment for.

LH – I agree with way it is handled here.